

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
UNITED STATES OF AMERICA, : CR-98-1101  
:  
v. : U.S. Courthouse  
:  
JOHN DOE, : Brooklyn, New York  
:  
Defendant. : TRANSCRIPT OF HEARING  
:  
: June 21, 2010  
-----X 10:30 a.m.

BEFORE:  
HONORABLE I. LEO GLASSER, U.S.D.J.

APPEARANCES:

For the Movant: MORGAN LEWIS & BOCKIUS LLP  
101 Park Avenue  
New York, New York 10178-0060  
BY: KELLY A. MOORE, ESQ.  
BRIAN A. HERMAN, ESQ.  
DAVID A. SNIDER, ESQ.

For the Respondent: WILSON ELSEER MOSKOWITZ EDELMAN  
& DICKER LLP  
150 East 42nd Street  
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BY: RICHARD LERNER, ESQ.  
LAUREN J. ROCKLIN, ESQ.

STAMOULIS & WEINBLATT LLC  
6 Denny Road - Suite 307  
Wilmington, DE 19809  
BY: STAMATIOS STAMOULIS, ESQ.

Court Reporter: Mickey Brymer, RPR  
Official Court Reporter  
United States District Court  
225 Cadman Plaza East  
Brooklyn, New York 11201  
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Proceedings recorded by mechanical stenography.  
Transcript produced by Computer-Assisted Transcription.

1 THE CLERK: This is criminal cause for order to show  
2 cause in docket number 98-CR-1101, U.S.A. versus Doe.  
3 Counsel, please state your name for the record.

4 MS. MOORE: Kelly Moore and Brian Herman from Morgan  
5 Lewis for movant John Doe.

6 MR. LERNER: Richard E. Lerner of Wilson Elser  
7 Moskowitz Edelman and Dicker for nonparty respondent Frederick  
8 M. Oberlander.

9 MR. STAMOULIS: Stam Stamoulis on behalf of nonparty  
10 respondents Jody Kriss and Michael Ejekam.

11 THE COURT: Everybody is ready to proceed?

12 MS. MOORE: Yes, your Honor. Could I ask who the  
13 gentlemen in the back row are?

14 MR. STAMOULIS: He's my law partner.

15 AUDIENCE SPEAKER: Good morning.

16 THE COURT: Good morning.

17 MS. MOORE: Your Honor, I would ask to proceed with  
18 the testimony of Mr. Oberlander.

19 THE COURT: I'm sorry.

20 MS. MOORE: I would ask we proceed with the  
21 testimony of Mr. Oberlander.

22 THE COURT: Please.

23 F R E D E R I C K M. O B E R L A N D E R , called  
24 as the witness herein, having been first duly sworn/affirmed,  
25 testified as follows:

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1 THE CLERK: Could you please state and spell your  
2 name for the record.

3 THE WITNESS: Frederick M. Oberlander, O-b-e-r-l-  
4 a-n-d-e-r.

5 THE COURT: You my be seated. Thank you.

6 All right, Ms. Moore.

7 DIRECT EXAMINATION

8 BY MS. MOORE:

9 Q. Mr. Oberlander, what do you do for a living?

10 A. I'm an attorney.

11 Q. How long have you been practicing law?

12 A. For a living, approximately seven years.

13 Q. For how long have you had a law license?

14 A. Ten years.

15 Q. And what type of law do you practice?

16 A. Mostly commercial law and primarily transactional,  
17 financial and taxation, but I do general work.

18 Q. Do you handle any criminal matters?

19 A. No.

20 Q. You're admitted in the State of New York; is that right?

21 A. Yes.

22 Q. You practice in both Federal and State Court?

23 A. Recently I started practicing in Federal Court. I was  
24 admitted a few months ago in Southern District.

25 Q. Are you admitted anywhere else other than New York?

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1 A. I was admitted pro hac in a couple of jurisdictions. I  
2 don't remember whether those expired or not.

3 Q. Did that include Delaware?

4 A. At one time.

5 Q. Where is your practice located?

6 A. In Montauk, New York.

7 Q. That's where your office is located?

8 THE COURT: Did you say Montauk?

9 THE WITNESS: Yes, in the Hamptons.

10 Q. What is the address of your office?

11 A. The street address is 28 Sycamore Lane.

12 Q. And is that a solo practice?

13 A. It is.

14 Q. Do you have any employees at all?

15 A. Not full time, but I occasionally add staff depending on  
16 needs.

17 Q. Now, you filed a complaint in the Southern District of  
18 New York captioned Jody Kriss, Michael Ejekam and Bayrock  
19 Group versus Bayrock Group and various others; is that  
20 correct?

21 A. Yes, I did.

22 Q. When did you file that complaint?

23 A. I'm sorry, I didn't hear you.

24 Q. When did you file that complaint?

25 A. The 10th of May.

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1 Q. Around the same time you sent an email to Ron Kriss  
2 attaching a copy of that complaint; is that correct?

3 A. I believe I sent that on May 12th.

4 Q. And was the version that you sent to Ron Kriss the same  
5 version that you filed in the Southern District of New York?

6 A. The version of the complaint itself was.

7 Q. What was different?

8 A. The exhibits to the complaint that I filed, which was  
9 physically filed in New York and not by ECF, had only limited  
10 excerpts from some of the materials that you referred to in  
11 the order to show cause as the sealed and confidential  
12 documents, but the file attachments on email that went to Ron  
13 Kriss I believe had additional pages in the PDF files on some  
14 of those documents.

15 MS. MOORE: Your Honor, may I?

16 THE COURT: Sure.

17 Q. Mr. Oberlander, let me show you a copy of the version you  
18 sent to Mr. Ron Kriss on May 12th. Is that the copy you sent  
19 to Ron Kriss?

20 A. It appears to be, but it is hundreds of pages. It would  
21 be impossible for me to tell for sure just glancing at it. It  
22 does appear to be.

23 MS. MOORE: Your Honor, I offer that.

24 THE COURT: Is there any objection to that?

25 MR. LERNER: No objection.

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1 THE COURT: Thank you. It will be received as I  
2 guess Plaintiff's 1.

3 Precisely what is that? Would you identify that for  
4 the record.

5 MS. MOORE: Your Honor, Exhibit 1 is the SDNY  
6 complaint captioned "Jody Kriss, et al. versus Bayrock  
7 Group."

8 THE COURT: Is that the document that you handed up,  
9 somebody handed up to me?

10 MS. MOORE: Yes, your Honor, that's Exhibit 1.

11 THE COURT: Together with all the attachments?

12 MS. MOORE: Correct.

13 MR. LERNER: Your Honor, I think Ms. Moore may be  
14 leading now with the topic.

15 THE COURT: I'm having a little trouble hearing you,  
16 Mr. Lerner.

17 MR. LERNER: I think Ms. Moore may be leading into  
18 areas of work product. Now, the topic of this order to show  
19 cause, as set forth in the order to show cause, is from whom  
20 Mr. Oberlander received the purportedly sealed and  
21 confidential documents and to whom he gave them, so, I would  
22 like to object in advance to any questioning that may go to  
23 why he did certain things and simply ask that the Court limit  
24 it to what he did, not why he did it.

25 THE COURT: Ms. Moore.

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1 MS. MOORE: Your Honor, I mean objections can be  
2 made to the questions asked. We believe the order to show  
3 cause --

4 THE COURT: This is in the nature of a motion in  
5 limine. To avoid constant objections and so on, if there's no  
6 objection to what it is that Mr. Lerner is suggesting would be  
7 appropriate, then we'll proceed accordingly.

8 MS. MOORE: Your Honor, I do intend to inquire as to  
9 what Mr. Oberlander knew and what his intent was specifically  
10 with respect to sealed documents.

11 THE COURT: What is the relevance of that insofar as  
12 this order to show cause is concerned? I understand the order  
13 to show cause in this proceeding is addressed to where these  
14 documents came from, how he obtained it and not what his  
15 intent was. I don't know what the relevance of that is. It  
16 seems to me your concern was the unauthorized or seemingly  
17 apparently unauthorized use and possession of sealed  
18 documents.

19 MS. MOORE: That's correct, your Honor. To the  
20 extent Mr. Oberlander knew they were sealed and acted anyway,  
21 we believe it is relevant to our application.

22 THE COURT: What is your application beyond that?

23 MS. MOORE: Eventually our application, your Honor,  
24 would be probably attorney's fees and sanctions related to his  
25 conduct which typically under the law follow the elements of

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1 whether or not there was in fact civil contempt of a court  
2 order.

3 THE COURT: Well, Ms. Moore, it would be perfectly  
4 proper to ask whether Mr. Oberlander was aware of the fact  
5 these documents were sealed. What his intent was I don't  
6 think has any relevance to this proceeding. Why don't you  
7 proceed.

8 MS. MOORE: Okay.

9 Q. Mr. Oberlander, attached as Exhibit A are two proffer  
10 agreements, a cooperation agreement and a pretrial statement;  
11 is that correct?

12 A. What you handed me you're referring to?

13 Q. Yes.

14 A. I think there's only one proffer agreement.

15 Q. Oh, two, I'm sorry, you're right. They are double-sided  
16 pages and I didn't see that.

17 From whom did you obtain the documents that were  
18 attached to the email you sent to Mr. Ron Kriss as Exhibits A  
19 and C?

20 A. Joshua Bernstein.

21 Q. Who is Joshua Bernstein?

22 A. He was a client of mine at one time.

23 Q. In what matter did you represent him?

24 A. In an action he had against Bayrock Group LLC in White  
25 Plains Supreme Court, New York.



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- 1 Q. Was there an engagement letter for that representation?
- 2 A. There was.
- 3 Q. Did he pay you for your legal services?
- 4 A. No, he did not.
- 5 Q. Were you paid by anyone else in connection with your
- 6 legal services in that matter?
- 7 A. No.
- 8 Q. Did you enter an appearance on his behalf in that matter?
- 9 A. No.
- 10 Q. Who entered an appearance on his behalf in that matter?
- 11 A. I really don't know. I know he was represented at all
- 12 times by a gentleman I would refer to as lead counsel. I had
- 13 no personal knowledge who put in an appearance for him.
- 14 Q. But you had a separate engagement letter with him?
- 15 A. Separate from what?
- 16 Q. That other individual's.
- 17 A. It was my own engagement letter. I wrote it.
- 18 Q. When did you stop representing Joshua Bernstein?
- 19 A. April this year, 2010.
- 20 Q. What date?
- 21 A. I have to check. Towards the end of the month.
- 22 Q. And was the termination of your attorney-client
- 23 relationship memorialized in any way?
- 24 A. There is -- there are emails that confirm that he is a
- 25 prior or past client for purposes of rules and privileges and

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1 not a current client.

2 Q. When did you obtain the Exhibits A and C to the SDNY  
3 civil complaint from Josh Bernstein?

4 A. It was the overnight of February 28th to March 1st. It  
5 was after midnight of February 28th, so that would be  
6 technically March 1st this year.

7 Q. And that was an overnight package?

8 A. No.

9 Q. How was it obtained?

10 A. He handed them to me.

11 Q. Where did he hand them to you?

12 A. In his office.

13 Q. Which is where?

14 A. That particular office was in an apartment on the Upper  
15 East Side.

16 Q. Would the documents be part of a bigger group of  
17 documents?

18 A. He handed the documents to me in physical form and to my  
19 recollection they were the only physical documents he handed  
20 me.

21 Q. What were the only physical documents he handed you?

22 A. He handed me a proffer and a cooperation agreement and a  
23 PSR. And for avoidance of ambiguity as I'm not a criminal  
24 lawyer, what he handed me had attached to the back of the  
25 proffer what I understand to be or you referred to as a DOJ

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1 financial statement, but I would not know that is considered  
2 as part of a proffer or not. Maybe attached to a cooperation  
3 agreement. To me there were three documents.

4 Q. Did he give you any other documents relating to my client  
5 John Doe's criminal case?

6 A. No.

7 Q. Did he give you a complaint that was filed in that case?

8 A. Not at that time. If you'll excuse me, for clarification  
9 I assume you're asking what he handed me at that time on March  
10 1st.

11 Q. So, he handed you nothing else on March 1st?

12 A. Not as related to the criminal matter, the CR matter,  
13 what is it, 1101.

14 Q. Did he provide you with a complaint in that case on some  
15 other date?

16 A. Yes, he did.

17 Q. When did he provide you with a complaint in that case?

18 A. I believe it was March 3rd.

19 Q. Was that once again in person?

20 A. No.

21 Q. In what form did he provide you --

22 MR. LERNER: I'll object to the questioning about  
23 the complaint in another unrelated matter.

24 THE COURT: I'm about to inquire about that,

25 Mr. Lerner. Complaint in what proceeding?

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1 MS. MOORE: United States versus John Doe, your  
2 Honor, sealed complaint.

3 MR. LERNER: I'm sorry, I was confused. I thought  
4 you were refer -- Ms. Moore is referring to a different  
5 document. I withdraw my objection.

6 THE WITNESS: Your Honor, may I just correct one  
7 thing I said?

8 THE COURT: Sure.

9 THE WITNESS: To the best my recollection the  
10 complaint was given to me-- I'm going on recollection -- on  
11 March 3rd. He sent me several documents and I'm certain the  
12 complaint was there.

13 THE COURT: Was that received by hand as well?

14 THE WITNESS: No, no. She asked me whether he ever  
15 gave me a complaint and I'm saying I'm substantially certain  
16 he did, and, if he did, it was in an email that was given to  
17 me or I received on March 3rd.

18 THE COURT: An email?

19 THE WITNESS: It was attached to an email, yes.

20 Q. In the email you received from him on March 3rd, did he  
21 attach any other documents related to the criminal case  
22 against my client in Federal Court in Brooklyn?

23 A. The same ones he had given me physically on the first  
24 were attached to that.

25 Q. Was an indictment or information or draft information

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1 attached as well?

2 A. It may well have been, but I just simply don't recall.

3 It could very well have been, yes.

4 Q. Have you in connection with this order to show cause gone  
5 back and checked what was attached to that email?

6 A. No.

7 Q. So, as you sit here today, you don't know what else was  
8 attached to that email?

9 A. I answered you to the best of my knowledge. I feel  
10 substantially certain that a complaint was and that I don't  
11 have any reason to doubt that the -- what you call an  
12 information, I think, is that what you referred to it as?

13 Q. A draft information I referred to it as.

14 A. Draft information. But I have no specific absolute  
15 certain recall because those were not in the order to show  
16 cause so I had no reason to check.

17 Q. How many documents were attached to the March 3rd email?

18 A. About four, five.

19 Q. But you don't know what they were other than the  
20 complaint and the one that was attached to the SDNY --

21 A. As I continue to say, I know the same three he gave me  
22 were attached to that email. I'm reasonably certain the  
23 complaint was attached to the email and I'm relatively certain  
24 that the draft information was and I believe that's it, but it  
25 is possible there may have been six -- four, five or six.

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1 This is the best information I can give you from  
2 recollection. I certainly don't deny that it was attached.

3 Q. The March 3rd email, was that simply an email from Josh  
4 Bernstein to you with attachments or was it forwarding an  
5 underlying email to which those documents had been attached?

6 A. May I ask for clarification, please?

7 Q. Absolutely.

8 A. Do you mean was there any message inside or just --

9 Q. No, I'm asking whether aside from the email that  
10 Mr. Bernstein sent to you, whether or not he was forwarding  
11 another email that had attached these documents?

12 A. You mean did I receive a forwarded email?

13 Q. Correct.

14 A. That had been primarily addressed to someone else and I  
15 was getting it forwarded?

16 Q. Correct.

17 A. That's not correct. It was addressed to me.

18 Q. And, so, it was just the email to you plus the  
19 attachments; is that correct?

20 A. It was the email was primarily addressed to me. There  
21 were other addressees.

22 Q. Who else was the email addressed to?

23 A. That would be Arnold Bernstein and Jerry, spelled  
24 J-e-r-r-y, I don't recall the last name, who was the gentleman  
25 I refer to as Josh's lead attorney in the White Plains case.

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1           If I may, your Honor, for clarification, I'm saying I  
2 didn't get forwarded somebody else's email. The email was  
3 addressed to three people and I was one of them.

4 Q.   Were there any CCs on that email?

5 A.   I don't recall.

6 Q.   In preparation for this hearing, you didn't review it?

7 A.   Probably a week or two, maybe three, when the order to  
8 show cause came in to check the dates, I'm substantially  
9 certain there were no cc's, but I will not say my memory is  
10 infallible. It would be highly unlikely there were any at all  
11 other than the three of us. I sincerely doubt there --

12 Q.   What did the email to you, Mr. Bernstein and other  
13 lawyers say?

14 A.   The first sentence in the email said, as requested, here  
15 are the Doe docs or the John docs. There was an additional  
16 sentence. I'm not convinced revelation of that sentence is  
17 within the very limited privilege waiver that Mr. Bernstein  
18 gave me, so however you want to handle that, but I can't  
19 testify to what else was in there.

20 Q.   Well, the email was addressed to Arnold Bernstein, who is  
21 Mr. Bernstein's father, right, not his lawyer, correct?

22 A.   No, that is not correct. He is always very much his  
23 lawyer and always held himself out to me as his attorney and  
24 Jerry as his lawyer.

25 Q.   In a recent conversation with us he did not hold himself

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1 out to be his lawyer, but putting that aside I don't believe  
2 you can waive attorney-client privilege in a limited fashion  
3 and your recent June 14th letter, is it your position you are  
4 not waiving it or it is not waived?

5 A. My counsel would know.

6 MR. LERNER: I spoke to Mr. Bernstein who stated to  
7 me he waived his privilege with respect to how Mr. Oberlander  
8 received the documents. So, that was the scope of the  
9 waiver.

10 MS. MOORE: Your Honor, I don't believe there can be  
11 partial attorney-client privilege waiver. I believe once you  
12 waive with respect to certain things, it is waived. Certainly  
13 what the email said is passing these documents on to  
14 Mr. Oberlander falls even within the waiver that they seem to  
15 have received.

16 THE WITNESS: Your Honor, I understand I am the  
17 witness but he was my former client. May I address the Court  
18 briefly?

19 THE COURT: Why don't you let your attorney do that.

20 THE WITNESS: Can I consult with him for a minute?

21 THE COURT: Absolutely. It is rather unorthodox to  
22 have a witness represented by a lawyer also act as his own  
23 attorney.

24 THE WITNESS: There's nothing I'm going to say that's  
25 secret.



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1 THE COURT: I don't know whether it is or isn't. I  
2 think you would be well advised to consult with your lawyer.

3 (Mr. Lerner and the witness confer.)

4 THE COURT: Where were we?

5 MR. LERNER: Your Honor, Mr. Bernstein in speaking  
6 with me gave a limited waiver. If that is to be interpreted  
7 as a waiver for all purposes, then he gave no waiver at all,  
8 so he can't -- Mr. Oberlander can't be asked further questions  
9 regarding these conversations or communications with  
10 Mr. Bernstein.

11 THE COURT: Well, Ms. Moore, again, what is the  
12 relevance of that question, or perhaps there's something I'm  
13 missing?

14 My understanding was that the entire purpose or focus  
15 of this proceeding from the very beginning that the order to  
16 show cause was presented to me was a concern and a real  
17 concern not only for your client but for the Court and the  
18 integrity of the entire criminal proceeding as well as to how  
19 documents which were clearly intended to remain sealed and  
20 clearly intended not to be available for public distribution  
21 or even public viewing by anybody unless by virtue of a court  
22 order unsealing those documents. So, the focus of this  
23 proceeding, as I understand it, is how did those documents  
24 which were sealed find its way into a complaint in a civil  
25 action commenced in the Southern District of New York, how did

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1 the persons who had possession of those documents, obviously  
2 had possession of them, acquire them in some fashion because  
3 they were attached to a complaint filed in the Southern  
4 District? How did those documents come into the possession of  
5 the persons who attached them to a complaint? That's the  
6 concern which I believe was the focus of this proceeding and I  
7 think that is what is at issue here. How did you get them,  
8 from whom, and then the question will be how did that person  
9 get them and from whom.

10 If those documents were obtained in some fashion  
11 other than by a voluntary delivery or disclosure of them by  
12 Mr. Doe, then there is a very, very serious concern which this  
13 Court has regarding that issue.

14 That is what is before me. With respect to counsel  
15 fees and all the rest of it, that's another matter.

16 MS. MOORE: Fair enough, your Honor.

17 Q. Mr. Oberlander, does the second sentence of the email  
18 address how Mr. Bernstein obtained the documents?

19 A. It does not.

20 Q. Now, did he when he spoke to you either in person on  
21 March 1st, or any other time, advise you of how he obtained  
22 those documents?

23 A. He did.

24 Q. When did he advise you of how he obtained them?

25 A. Every time, one time or you mean the first time, what?

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1 Q. Let's start with the first time.

2 A. The first time would be March 1st.

3 Q. What did he say to you?

4 A. He said Doe gave them to him but to be clear, the general  
5 impression, because I can't recall the exact words, the  
6 general impression was that Doe gave them many documents and  
7 included among the documents were these.

8 Q. Did he say whether or not Doe provided them in electronic  
9 form or hard copy?

10 A. Not at that time.

11 Q. And did you credit his statement that Doe gave him these  
12 documents?

13 A. In the context of everything else that he told me during  
14 the preparation of his White Plains case, yes, I did.

15 Q. Why did he give you these documents?

16 A. You have to ask him that. They were unsolicited. I  
17 didn't say would you please give me these documents. He  
18 volunteered.

19 Q. You described the first sentence of his email to be as  
20 requested here are the documents. What's the request you're  
21 referring to?

22 A. Because he gave them to me physically and I have a  
23 scanner and I prefer to work with electronic records and I  
24 probably March 1 or March 2 -- I mean I forgot which day it  
25 was, asking if he could possibly send them to me in PDF form

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1 and it would be easier for me. It was here, I'm sending you  
2 PDF files.

3 Q. And, so, beyond the first conversation that he told you  
4 Doe gave them to him, what other conversations have you had  
5 with him describing how he obtained them?

6 A. Indirectly through third party, during the preparation of  
7 an affidavit for this proceeding, Mr. Bernstein from my  
8 understanding and this, of course, is hearsay, my  
9 understanding Mr. Bernstein clarified that Mr. Doe had given  
10 him several disks containing files and that these were among  
11 them, but, as I said, that was told to me by someone who  
12 claims that he said it to him and I can't say whether or not  
13 it is true.

14 Q. Who was it that claims that was said to him?

15 MR. LERNER: That would be Richard Lerner.

16 Mr. Bernstein said to me when we were having a conversation  
17 that he thought he gave them to Mr. Oberlander on -- or he  
18 obtained them on a computer disk from Mr. Doe.

19 Q. And, so, Mr. Oberlander, is it your understanding  
20 Mr. Bernstein thinks that's how he obtained them or he knows  
21 that's how he obtained them?

22 A. I have absolutely no idea what relative state of  
23 confidence he has in his memory.

24 Q. And the document that was forwarded to you, it was not  
25 part of a disk, right, it was not part of a set of a bunch of

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1 documents; what he sent to you were five documents relating to  
2 a criminal matter, right?

3 A. He sent me to be specific five separate attachments to  
4 one email. Whether and what degree an attachment is a  
5 document in the context of your question I'm not certain.

6 Q. But it wasn't part of a bigger disk that contained a  
7 whole bunch of documents; is that right?

8 A. There is no difference. He sent me an email. I'm not  
9 following your question.

10 Q. My understanding is through a third party, namely,  
11 Mr. Lerner, who had a connection with this hearing and advised  
12 that Mr. Bernstein claims that my client gave him three disks  
13 that contained a bunch of documents including these; is that  
14 right?

15 A. No. First of all, nobody said there were three. I  
16 believe we said it is a few and that's indeterminate. Yes, I  
17 just answered that question. It is my understanding that  
18 Mr. Bernstein has some degree of confidence, more than zero or  
19 less than 100, that the physical means by which he obtained  
20 them from Mr. Doe was on disks.

21 Q. But what you in turn received from Mr. Bernstein was not  
22 the disk, you obtained the individual separate documents; is  
23 that right?

24 A. I received -- are we talking about ever, on the 3rd, in  
25 that email? What specifically are we talking about?

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1 Q. We're talking about March 1st, the 3rd or any other time  
2 you may have received these documents.

3 A. I only received them twice and as I testified on March  
4 1st I was given three what I call documents. That's the way I  
5 testified. They were three successive papers stapled  
6 together. So to me that's three documents. Then, on March  
7 3rd I got an email that had five attachments. You can say an  
8 attachment is a document, it is perfectly acceptable usage,  
9 but the term document there doesn't necessarily refer to  
10 document in any other context.

11 I'm telling you as honestly as I can I got four, five  
12 or six attachments on that email. If you want to refer to  
13 attachment as a document, that's okay with me.

14 Q. Did it ever occur to you that Mr. Bernstein had stolen  
15 those files?

16 A. Work product privilege.

17 Q. You're asserting the work product privilege to answer  
18 that question as to whether or not it ever occurred to you you  
19 may have been obtaining stolen documents?

20 A. Any thoughts I had about the preparation of his case or  
21 his case including materials given to me by anybody are work  
22 product.

23 Q. I'm concerned with your state of mind. Did you think you  
24 were obtaining stolen documents?

25 A. Work product exception.

Oberlander-direct/Moore

1 Q. You knew, did you not, that Mr. Bernstein upon being  
2 fired from Bayrock had taken thousands of pages of documents  
3 with him?

4 MR. LERNER: Objection.

5 THE COURT: I will allow it.

6 A. I don't know any such thing.

7 Q. You knew he was in possession at his home of thousands of  
8 pages of documents of Bayrock; is that right?

9 A. No.

10 Q. Were you aware he was in possession of Bayrock documents  
11 at his home?

12 MR. LERNER: At what time, Ms. Moore?

13 MS. MOORE: After he was fired from Bayrock.

14 A. I'm sorry, I'm confused. You're asking me if I'm aware  
15 of what he possessed in his home on every day since the day he  
16 was hired?

17 Q. No. On any day after he was fired are you aware that he  
18 was in possession of documents of Bayrock's?

19 A. If you can define, please, for me, clarify when you say  
20 of Bay Rock's, are you specifically referring to documents by  
21 which Bayrock would assert ownership of the intellectual  
22 property of the contents.

23 Q. Documents taken from the premises of Bayrock's offices is  
24 what I mean by Bayrock documents.

25 A. So, that would include his own personal property that he

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1 took home with him.

2 Q. Excluding his own personal property.

3 A. Mr. Bernstein had documents in his office. I didn't read  
4 them, I don't know what they were. I certainly have no  
5 information as to what he did or didn't take.

6 Q. But you knew that he was fired, right?

7 A. He told me that he was fired, so I assume it is true.

8 Q. As a practicing attorney, you are aware when people are  
9 fired they are typically not permitted to take documents and  
10 property of their employer with them, right?

11 A. I'm sorry, I'm not aware of what's typical in the world.

12 Q. So, when you obtained these documents, cooperation  
13 agreement, proffer agreement and a PSR, you had no concern  
14 these documents were stolen?

15 A. Work product.

16 Q. Are you familiar with the declaration that Thomas Hylan  
17 submitted to the Court in connection with your opposition to  
18 this motion?

19 A. It's been a couple weeks since I've seen it, but, of  
20 course, I did read it.

21 Q. By the way, does Mr. Hylan still represent you?

22 MR. LERNER: The law firm of Wilson Elser represents  
23 Mr. Oberlander in this matter. Mr. Hylan is my partner.

24 Q. Did you draft the Hylan declaration?

25 A. Did I draft it?



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1 Q. Yes.

2 MR. LERNER: Objection.

3 THE COURT: Sustained.

4 Q. Did you read it before it was filed?

5 A. I'm sure I did.

6 Q. Do you agree with its contents?

7 MR. LERNER: Objection.

8 THE COURT: Pardon.

9 MR. LERNER: Objection as to relevance.

10 THE COURT: Objection is sustained.

11 It would seem to me if Mr. Hylan was in effect the  
12 agent of Mr. Oberlander and Mr. Oberlander had seen that  
13 document, it seems to me 801(c) whatever subdivision in the  
14 Federal Rules of Evidence might be applicable.

15 Why don't you move on.

16 Q. Mr. Oberlander, if you knew at the time that that  
17 declaration was filed that Mr. Bernstein said he got those  
18 documents voluntarily from Mr. Doe, why is a good portion of  
19 that declaration committed to an inquiry as to whether or not  
20 my client had kept the documents under lock and key?

21 A. You would have to ask Mr. Hylan. I'm sure he would make  
22 the work product objection, if you did.

23 Q. It is your testimony at the time that declaration was  
24 filed you had a good faith belief Mr. Bernstein obtained the  
25 documents legally?

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1 A. I told you that any belief or thoughts I had about the  
2 documents with respect to what he said are work product.

3 Q. There was a cross motion made in connection with your  
4 opposition. You submitted an affidavit in connection with  
5 that and in that you say that you believe that permitted to  
6 contact the client, who I assume is Mr. Bernstein, he would  
7 submit an affidavit that described how he obtained the  
8 documents; is that correct?

9 A. Something like that.

10 Q. That motion was granted by the court; is that right?

11 A. So many words, yes.

12 Q. And did you thereafter contact Mr. Bernstein?

13 A. He --

14 MR. LERNER: Your Honor, I contacted Mr. Bernstein.  
15 I spoke with him about the issues. He agreed to a, quote,  
16 unquote, limited waiver to allow Mr. Oberlander to testify as  
17 to his giving the documents to Mr. Oberlander. I prepared an  
18 affidavit based on what he had told me and then his father  
19 intervened and said speak with me only, he's not submitting  
20 any affidavits to the Court, he's represented by counsel.

21 Q. In a follow-up letter to the Court in connection with  
22 this matter, the other attorney, Mr. Lerner, submits a letter  
23 on June 14th, and that letter very specifically says that you  
24 obtained the documents from Mr. Bernstein and that  
25 Mr. Bernstein told you he obtained them from Mr. Doe, but that

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1 any statements in that letter are not yours. Specifically  
2 states the statements in the letter are not yours.

3 Why is that?

4 A. You would have to ask the author of that letter.

5 Q. You stand by the statements that you obtained from  
6 Mr. Bernstein and Mr. Bernstein told you he obtained them --

7 MR. LERNER: May I address it?

8 Q. -- from Mr. Doe?

9 MR. LERNER: May I address the Court as to why I  
10 made certain statements or should we move on?

11 THE COURT: It seems that question has been answered,  
12 Ms. Moore.

13 Q. Do you know who would have been given or provided any of  
14 the documents you were given either on March 1st or that you  
15 obtained on March 3rd, 2010?

16 A. I'm sorry, I missed the first few words of the question.

17 THE COURT: So did I.

18 Q. To whom have you given or provided the documents that you  
19 obtained on March 1st and March 3rd from Mr. Josh Bernstein?

20 A. As to everything other than the documents you referred to  
21 in the order to show cause as the sealed and confidential  
22 documents, it is my recollection that I never gave them to  
23 anyone. So, as to the sealed and confidential, actually, let  
24 me amend that, I apologize. I believe I forwarded the email  
25 intact to my attorneys, so my attorneys received everything

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1 that was attached to that email.

2 Q. Who are your attorneys?

3 A. Wilson Elser.

4 Q. When did you send it to them?

5 MR. LERNER: I believe it was last Saturday.

6 THE COURT: I'm sorry.

7 MR. LERNER: I believe it was the Saturday before  
8 this past Saturday. I can check my Blackberry, if the Court  
9 wants to know the precise date.

10 Q. So, other than your attorneys, Wilson Elser, you did not  
11 provide the March 3rd email in its entirety to anyone else; is  
12 that correct?

13 A. To the absolute best of my recollection, I did not  
14 forward intact that email to anyone else. That's to the best  
15 of my recollection. I could be mistaken.

16 Q. Okay.

17 Now let's take it to the other documents, even if  
18 they are not intact, any part of them. The documents we  
19 referred to as the sealed and confidential documents, to whom  
20 have you provided those documents?

21 A. The clerk of the Southern District, the cashier, the  
22 in-take clerk, whatever her official title is who receives  
23 physical filings was given the original complaint and attached  
24 to there were I believe five pages from the PSR, the two  
25 proffer agreements and the cooperation agreement, but not DOJ

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1 financial statement, and Mr. Kriss received those documents  
2 electronically in the same form that Mr. -- I'm sorry, this is  
3 a confusing answer. Let me start it again.

4           Mr. Jody Kriss, my client, was given those documents  
5 to the extent that they were given in the email to Ron Kriss.  
6 In other words, as I testified, the attachments on the May 12  
7 email to Ron Kriss had more pages in some of the sealed and  
8 confidential documents, so those versions went to Ron Kriss on  
9 May 12th at around 12:30 noon. About an hour earlier I sent  
10 the same email with slightly different text to John Elzufon,  
11 who is an attorney representing Alex Solomon, one of the  
12 defendants in the case, and I sent him the same attachments  
13 Ron Kriss had.

14           Jody Kriss I believe was copied on one of those  
15 emails and Stam Stamouillis, who is Mr. Kriss's attorney from  
16 Delaware and local counsel for the prior Delaware matter,  
17 received a copy of that email, and prior to that the only  
18 other thing I can recall is that a couple of weeks before  
19 filing the complaint I gave extracts of those documents  
20 electronically to Mr. Kriss for his use and verification of  
21 the complaint because he had to verify the complaint.

22           To the best of my knowledge, that's the absolute --  
23 actually, no, let me just change that. There was one other  
24 person. I believe I sent one or two of them to another  
25 attorney sometime in March.

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- 1 Q. Who is that attorney?
- 2 A. The gentleman's name is David Schlecker.
- 3 Q. He is an attorney of yours?
- 4 A. Yes.
- 5 Q. Could you spell John Elzufon's last name for us, please?
- 6 A. E-l-z-u-f-o-n.
- 7 Q. And Mr. Schlecker's last name?
- 8 A. S-c-h-l-e-c-k-e-r.
- 9 Q. So, besides Jody Kriss, Ron Kriss, John Elzufon, Stam
- 10 Stamoulis, Wilson Elser, David Schlecker, is there anyone else
- 11 you know of to whom you sent any part or portion of the
- 12 documents we have been referring to as the sealed and
- 13 confidential documents or any other documents relating to
- 14 Mr. Doe's criminal file?
- 15 A. I don't know what documents related to his criminal file
- 16 means. To the best of my recollection there isn't anybody
- 17 else I sent them to.
- 18 Q. To your knowledge, do you know whether or not any of the
- 19 other people you sent them to sent them further to anyone
- 20 else?
- 21 A. I have no knowledge that they did, no. I have no
- 22 knowledge, sorry.
- 23 Q. Did they ever advise you that they had it?
- 24 A. Not specifically. I'm not -- no, not specifically,
- 25 nobody said to me we sent these down here to somebody else.

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1 No.

2 Q. Not specifically did they say they had --

3 A. Mr. Elzufon, who is an attorney representing one of the  
4 defendants, Alex Solomon, told me that he contacted Alex  
5 Solomon's insurance carrier, CNA, to advise them of what was  
6 going on. So, I suppose one could presume he sent some or all  
7 up there. I really don't know. I never asked. It is not  
8 unreasonable to assume he might have.

9 May I add something, your Honor?

10 THE COURT: Sure.

11 THE WITNESS: I believe it was on the 13th that Judge  
12 Buchwald directed me to forward to several people who received  
13 the complaint with the attachments an order advising them they  
14 were not to disseminate it. So, presumably whatever would  
15 have happened by the 13th. Nobody has spoken to me since then  
16 about any of this.

17 Q. Did you follow Judge Buchwald's order and contact  
18 everyone to whom you had sent it?

19 A. Indeed I did.

20 Q. Besides providing the actual documents, the ones referred  
21 to as the sealed and confidential documents, did you discuss  
22 the information contained in any of those documents with  
23 anyone?

24 A. Yes.

25 Q. With whom did you discuss the information contained in

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1 those documents?

2 MR. LERNER: Objection. This is beyond the scope of  
3 the order to show cause.

4 THE COURT: Sustained.

5 Q. Who drafted the SDNY complaint?

6 A. I did.

7 MR. LERNER: Objection, that's also beyond the  
8 scope.

9 THE COURT: It is in the record. It is part of the  
10 evidence in this case.

11 Q. Are you aware of who has reviewed that complaint?

12 A. Would you be more precise about the phrase reviewed?

13 Q. Read it.

14 A. Mr. Kriss read it.

15 THE COURT: There are several Mr. Krisses.

16 THE WITNESS: Referring to my client Jody Kriss. I  
17 apologize.

18 A. My client read it, I read it and I need to request  
19 clarification -- actually, no, I will answer it directly. I  
20 have been told by my lawyers at Wilson Elser that two of them  
21 have read it and beyond that nobody told me that they read it  
22 and furthermore whether they read it -- whether they read part  
23 of it, it is unclear from your question what you're asking.

24 Q. Did you know at the time you filed the complaint in the  
25 Southern District of New York Mr. Doe's entire criminal case



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1 was under seal in the Eastern District of New York?

2 MR. LERNER: Objection.

3 THE COURT: I will allow that.

4 A. Truthfully, I don't know it now. By that I don't mean to  
5 contradict what the Court said. I certainly respect the  
6 Court. And last week, if I'm not mistaken, the Court said and  
7 I'll get the quote later on, I apologize to your Honor, that  
8 there is no order. At the beginning of the matter I had  
9 everything filed in the case sealed. Whatever the Court's  
10 exact words were, certainly I was there, I heard that, I  
11 assume it is true, and if that's knowledge, that's the first  
12 time I ever had such knowledge.

13 Q. That's the very first time you had knowledge?

14 A. That's the very first knowledge -- first time, if it is  
15 knowledge, that is the first time I had knowledge that the  
16 entire record was sealed.

17 Q. How about the exhibits that were attached to the SDNY  
18 complaint, did you know that some of them were sealed?

19 A. I still don't know that because when the Court said -- I  
20 believe what the Court said last week in further comment was  
21 that his Honor checked the computer files, found that the  
22 general files, if I'm not mistaken, was marked sealed and his  
23 Honor said that there were six documents listed without  
24 description that were under seal and that he didn't look to  
25 see what they were, but could if he wanted to. My point being

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1 that I actually have no knowledge that they're sealed.

2 Q. Well, paragraph 96 of that complaint says because his  
3 guilty plea to the criminal RICO proffer and cooperation  
4 agreement were sealed. When you drafted that portion, did you  
5 know that they were sealed?

6 A. I drafted more words after that. You're moving them out  
7 of context to distort the meaning.

8 Q. Because his guilty plea to criminal RICO proffer and  
9 cooperation agreement were sealed, as he was aiding the  
10 prosecution of his Mafia and Russian organized crime  
11 confederates, does that change your understanding of the  
12 documents were sealed?

13 A. Well, I know what I wrote. Since it is not -- wait a  
14 second. I can check. Can you hang on while I go look at  
15 paragraph 96?

16 Q. Absolutely.

17 A. Please, since I'm confused, what is exactly your question  
18 here?

19 Q. When you wrote because the guilty plea to criminal RICO,  
20 proffer and cooperation agreement were sealed, did you know  
21 that those documents were sealed?

22 A. I've already testified that I never have and still don't  
23 know that they're sealed.

24 Q. So, what is the meaning of that sentence when you say  
25 were sealed?

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1 A. It means I'm alleging on behalf of my clients that we can  
2 prove, should there be any fact at all, an ultimate fact that  
3 they were sealed, that doesn't mean I know it to be true nor  
4 are those my words. I wrote them on behalf of my clients.

5 Q. When you wrote that it is your testimony you were not  
6 under the belief the documents were sealed?

7 A. I already testified what I believe to be the state of the  
8 world with respect to how I represent them and what I chose to  
9 aver on their behalf as work product. This complaint is  
10 Mr. Kriss' statement that he believes the following to be true  
11 by the requisite level of pleading confidence. If I'm not  
12 mistaken, is it Rule 11? Whatever it is in Federal Court. It  
13 is not an ultimate fact. Nothing in the complaint depends on  
14 it. It is not judicial admission, and, even if it were, it  
15 isn't mine.

16 Q. It is your client's?

17 A. I said it is not judicial admission and, but, even if it  
18 were, it is not mine.

19 Q. You disagree with the statement that the criminal  
20 complaint, the proffer and cooperation were sealed?

21 A. I couldn't very well do that because that would require  
22 my knowledge of whether they are sealed and I still don't know  
23 whether they are sealed.

24 Q. Mr. Oberlander, did you yourself ever make any attempt to  
25 obtain any portion of the criminal file from the courthouse

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1 here in the Eastern District of New York?

2 A. Through my agent?

3 Q. Through anyone.

4 A. Yes.

5 Q. And did you try to obtain any aspect of the criminal file  
6 relating to my client in the document?

7 A. I think it was the 10th was the date of the first hearing  
8 here.

9 Q. I'm sorry.

10 A. It was the date of the first hearing here. I believe  
11 that is May 10th.

12 MR. LERNER: June 11th.

13 THE WITNESS: Oh, June 11th. The date of the first  
14 hearing.

15 Q. But prior to filing the SDNY complaint, it is your  
16 testimony you made no effort to actually obtain any portion of  
17 the criminal case?

18 A. That's correct.

19 Q. Are you familiar with PACER?

20 A. Oh, you mean the computer system?

21 Q. Yes.

22 A. I am.

23 Q. Have you used it?

24 A. Ever?

25 Q. Yes.

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1 A. Yes.

2 Q. Did you attempt to use it to obtain information related  
3 to the criminal case against my client in the Eastern District  
4 of New York?

5 MR. LERNER: Objection. The question is too broad.  
6 If you're asking the attempted use to find out any information  
7 about the case --

8 MS. MOORE: I am.

9 MR. LERNER: Are you able to answer that?

10 THE WITNESS: Yes.

11 MR. LERNER: Okay.

12 A. Yes, I did.

13 Q. And when did you do that?

14 THE COURT: Is that when or why?

15 MS. MOORE: When.

16 A. I would have to check. My guess would be around the  
17 20th, 25th of May. I really can't be certain. It is  
18 certainly easy enough to check. It would be sometime after  
19 filing the complaint.

20 Q. You're certain you never checked prior to filing the  
21 complaint?

22 A. Virtually certain because my credit card that I gave  
23 PACER to bill long ago changed the number and I never updated  
24 it. I have no recollection of logging onto PACER. I have no  
25 recollection of logging onto PACER for anything prior to that

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1 time since 2008.

2 Q. When you logged onto PACER in late May, what you pulled  
3 up was a screen that says this case is under seal; is that  
4 correct?

5 A. Something like that, yes.

6 Q. But as you sit here today it is still your testimony you  
7 have no knowledge this case is under seal?

8 A. I never testified to that.

9 Q. What is the state of your knowledge as to whether or not  
10 this case is under seal?

11 A. That the Court said from the first date of the case, the  
12 criminal matter, that he had all documents filed under seal  
13 and I further testified that I have no knowledge that these  
14 particular documents were filed under seal and I don't know  
15 what the whole case under seal means, but I certainly respect  
16 what the Court said a week ago and that's the sum total of my  
17 knowledge. I have absolutely no knowledge of what documents  
18 are in fact filed under seal other than that I heard the Court  
19 say there are six listed. His Honor didn't know what they  
20 were.

21 Q. So, prior to filing the SDNY complaint you made no effort  
22 whatsoever to verify the statement in the complaint that they  
23 were under seal?

24 A. I didn't say that.

25 Q. Okay.

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1 Did you make any attempt prior to filing the  
2 complaint to verify whether the documents you were attaching  
3 them to or any part of Mr. Doe's criminal case was under seal?

4 A. The basis for the allegation in the complaint are  
5 contemporaneous press accounts from 2007 and which reputable  
6 reporters list some parts as being under seal. I believe the  
7 exact phrase, for example, from an article I think December  
8 17th, 2000, in the New York Times, within a day or two of that  
9 said that a federal complaint remains under seal. Based on  
10 that and press coverage of Mr. Doe, it was eminently  
11 reasonable to allege that at the time Mr. Kriss was hired in  
12 2003 those documents were under seal, but, as I said, that's  
13 an averment or allegation on behalf of Mr. Kriss, who  
14 presumably had come to that conclusion from his verification  
15 of the complaint and it is a reasonable complaint he had. I  
16 have not testified as to mine.

17 Q. My question, Mr. Oberlander, was prior to filing this  
18 complaint did you make any effort to verify whether or not the  
19 documents you were attaching thereto or any other part of my  
20 client's criminal file were under seal?

21 MR. LERNER: Objection, asked and answered.

22 THE COURT: Answer it again, you can answer it.

23 A. I referenced the press accounts. That's how I verified  
24 it.

25 Q. Anything besides press accounts that you went to to

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1 attempt to verify whether the documents you were attaching or  
2 any part of the criminal case were under seal?

3 A. Anything else I did, I don't recall specifically, no.

4 Q. You just referenced a New York Times article which  
5 specifically states a federal complaint brought against him,  
6 meaning my client, in a 1998 money laundering stock  
7 manipulation case was filed in secret and remains under seal;  
8 is that right?

9 A. The question is whether I referenced that article? Yes,  
10 I just did.

11 Q. Did you read that article?

12 A. Many times.

13 Q. Did you read it with utmost care before filing the  
14 complaint in the Southern District?

15 MR. LERNER: Objection.

16 THE COURT: Sustained.

17 Q. Did you read it before filing the complaint in the  
18 Southern District?

19 A. I read it in 2007, when it first came out. That was  
20 before filing the complaint.

21 Q. So, you knew certainly that as of December 2007, when  
22 that article was written, the complaint was still under seal;  
23 is that right?

24 A. No. I must have testified at least six times, I still  
25 don't know that and anybody that would believe necessarily



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1 anything they would read in the newspaper like that I'm not  
2 among the set of. I continually told you that I do not know  
3 what documents are under seal, never have known what documents  
4 are under seal and the fact that the New York Times says that  
5 one document is under seal is sufficient for purposes of the  
6 well pled complaint, but does not make me know anything is the  
7 case.

8 THE COURT: May I for purposes of clarification? You  
9 testified that at some point you accessed or attempted to  
10 access the file in this case via PACER.

11 THE WITNESS: That's correct.

12 THE COURT: I don't recall hearing and if it was  
13 mentioned I missed it, what date was that?

14 THE WITNESS: Sometime in the last few days of May,  
15 May 20 or 25. It may -- sometime between May 20 and June  
16 10th. I would have to check. It was after filing the  
17 complaint. It was after the order to show cause was served.

18 THE COURT: Thank you very much.

19 Q. The criminal complaint referenced in the New York Times  
20 article as being under seal, you made no independent effort to  
21 obtain that; is that right?

22 A. Independent of what?

23 Q. Independent of receiving it from Joshua Bernstein.

24 A. I testified that my attorneys attempted to access the  
25 court file on June 11th, so presumably the answer is I did on

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1 June 11th.

2 Q. Any time prior to that?

3 A. No.

4 Q. You --

5 A. Excuse me. I went onto PACER. Theoretically, if it had  
6 been there and available, I guess that would be a constructive  
7 attempt. I'm not going to mislead. Since nothing shows up  
8 other than sealed --

9 Q. You quote extensively from that complaint in your SDNY  
10 complaint; is that right?

11 THE COURT: Extensively from what?

12 MS. MOORE: The criminal complaint.

13 MR. LERNER: Objection. This goes beyond the  
14 scope.

15 THE COURT: Mr. Lerner, that document is in  
16 evidence.

17 MR. LERNER: I understand, your Honor.

18 THE COURT: If it is in evidence, it is in evidence  
19 as to what it says and it is in evidence as to what it is that  
20 may have been quoted. It is part of the record. It is a  
21 rhetorical question. It is a rhetorical one if it has been  
22 quoted. It is Mr. Oberlander's complaint. I think the  
23 assumption is a correct one, he quoted it, he signed the  
24 complaint.

25 Q. Mr. Oberlander, can you please turn to page 40 of that

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1 complaint, paragraph 207.

2 A. Yes.

3 Q. The quote contained in paragraph 107 that is indeed from  
4 the criminal complaint I have been referring to; is that  
5 right?

6 A. The complaint says it is. I certainly wouldn't knowingly  
7 misrepresent it. Without the complaint in front of me, I have  
8 to rely on what this says is right. I wrote it; I assume it  
9 is true.

10 Q. Did you obtain that from the actual complaint, the  
11 criminal complaint?

12 A. I must have. I mean if you're asking me do I recall  
13 writing that paragraph 207, what day and time, no, but I must  
14 have if this is in fact from the complaint. If you don't show  
15 me the complaint, I have to assume it speaks for itself. If  
16 you show me the complaint, then I will be able to tell you  
17 whether I copied it.

18 Q. Did you obtain the complaint from which you quoted from  
19 Mr. Bernstein on March 3rd via email?

20 A. Yes. This must now mean what I assume was true is in  
21 fact true. It is one of the documents attached to the March  
22 3rd email.

23 Q. You did not attach that complaint as one of your exhibits  
24 to the SDNY complaint. Why not?

25 A. Work product.

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1 MR. LERNER: Objection.

2 Q. Was it because you knew it was under seal?

3 MR. LERNER: Objection.

4 THE COURT: I will allow it.

5 A. No.

6 Q. Was it because you knew it was stolen?

7 THE COURT: Sustained.

8 Q. Exhibit C to Movant's Exhibit 1 is a presentence report.  
9 Did you read the entire presentence report before filing the  
10 SDNY complaint?

11 A. Yes.

12 Q. Did you read the sentence on page two that reads, "It is  
13 the policy of the federal judiciary and the Department of  
14 Justice that further re-disclosure of the presentence  
15 investigation report is prohibited without consent of the  
16 sentencing judge"?

17 A. I did.

18 Q. What did you understand it to mean?

19 A. That further disclosure by employees of the Bureau of  
20 Prisons is against the policy of the judiciary and the Justice  
21 Department without the consent of the sentencing judge.

22 Q. So, you did not think that that sentence applied to your  
23 disclosure of the PSR; is that your testimony?

24 A. That's correct.

25 Q. Did you make any attempt to obtain permission from the

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1 sentencing judge before filing the SDNY complaint?

2 MR. LERNER: Objection. He just answered. It was  
3 unnecessary.

4 THE COURT: I think I can take judicial notice of the  
5 fact, Ms. Moore, that no request was made of me by anybody  
6 other than the Probation Department regarding this presentence  
7 report.

8 Q. Now, Mr. Oberlander, you cite an email to Ron Kriss on  
9 May 12; is that correct?

10 A. I may have sent more than one.

11 Q. Let me show you what's been marked Movant's Exhibit 2.

12 MR. LERNER: Your Honor, may I bring my client a cup  
13 of water?

14 THE WITNESS: Apparently I'm thirsty.

15 MR. LERNER: Can we have the last question read  
16 back?

17 MS. MOORE: I think I just handed the witness an  
18 exhibit.

19 Q. Can you take a moment to review that exhibit, please?

20 A. I did.

21 Q. Is that in fact the email you sent to Ron Kriss on May  
22 12?

23 A. It looks like it. I don't recall every word and how I  
24 wrote it.

25 MR. LERNER: Your Honor, I object.

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1 THE COURT: I don't know what it is. Have you seen  
2 the email? Do you know what is being referred to?

3 MR. LERNER: Yes.

4 THE COURT: What is the objection?

5 MR. LERNER: Objection is it has nothing to do with  
6 to whom Mr. Oberlander forward the documents or how he  
7 received them. It is beyond the scope.

8 THE COURT: May I see the email?

9 MS. MOORE: I'm sorry, your Honor. I thought I  
10 handed it up. It is Exhibit 2.

11 MS. MOORE: If I may, your Honor?

12 THE COURT: I have it.

13 MR. LERNER: There's nothing in this email...

14 THE COURT: Ms. Moore.

15 MS. MOORE: Your Honor, the document is in fact  
16 forwarding the complaint with the exhibits asking that it be  
17 re-forwarded. It mentions possibilities with respect to  
18 filing under seal. I believe it is clearly relevant to  
19 whether or not this witness knew that the attachments were  
20 under seal to begin with.

21 THE COURT: I will allow it. There are some portions  
22 of it which may not have any relevance to this proceeding, but  
23 certainly paragraphs A, B and C attached to the first  
24 paragraph are perfectly relevant to this proceeding and  
25 perhaps the last paragraph is as well. I'll receive it as

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1 Plaintiff's 2. You can move on.

2 MS. MOORE: Yes.

3 Q. Mr. Oberlander, in this email you state there are three  
4 objections I filed publicly today, I filed under seal. I  
5 arranged for an agreement with every defendant but Nixon  
6 Peabody.

7 At the time you sent him the email you had already  
8 filed it publicly, had you not?

9 A. According to the court rules I had, but the -- yes.  
10 According -- actually, seriously, I can't answer that only  
11 because the terminology is confusing to me. I had filed a  
12 complaint already but it had not been public.

13 Q. When you say you forwarded this to Julius, who is Julius?

14 A. Ron Kriss would have understood that to be Julius  
15 Schwartz.

16 Q. Julius Schwartz is a principal of Bayrock?

17 A. I have no idea what he is now, but at one time he was.  
18 According to various testimony he gave title as executive vice  
19 president, general counsel and considered himself de facto  
20 chief executive officer of the company.

21 Q. And he's a former law partner of Ron Kriss; is that  
22 right?

23 A. I think they called them shareholders, but, yes.

24 Q. At the firm of Ackerman?

25 A. Ackerman Senterfitt.

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1 Q. And in this email you basically say there's three options  
2 or pay the money back now; is that right?

3 A. No.

4 Q. Give the money back and now it is over. What is the  
5 meaning of that?

6 A. It means Julius Schwartz personally in conspiracy with  
7 other people, including Mr. Doe, stole in cash equivalent  
8 about eight million dollars from my clients in terms of the  
9 value of the partnership interest, they converted about  
10 \$30 million, probably tens of millions of dollars, depending  
11 on the analysis from the Treasuries of New York State, New  
12 Jersey and the United States, and I don't know how many  
13 millions from people they defrauded when they were buying  
14 condominiums and that they had plenty of time to rectify their  
15 theft, embezzlement, larceny, fraud and tax evasion.

16 Q. If in response to this email they agreed to pay back  
17 millions of dollars you said were owed, would you have not  
18 filed the complaint?

19 A. I believe I testified I already had.

20 Q. Would you have not served it? Would you have retracted  
21 it?

22 A. If all defendants settled? I don't know who they is.  
23 You said if they had paid. Who is the they in your question?

24 Q. Julius.

25 A. What about it?



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1 Q. Well, the way I read this email, Mr. Oberlander, correct  
2 me if I'm wrong, is that you're giving him three options in --  
3 or demand for money. You're saying I'll do this, this or this  
4 unless you pay me the money back.

5 Am I reading that wrong?

6 A. You are.

7 Q. It was not your intent to make it a demand for money in  
8 exchange for not filing it publicly?

9 A. Of course it wasn't.

10 Q. Explain to me the last paragraph. I believe it is  
11 possible to get this in under seal if Bayrock joins a joint  
12 motion in Part One to seal the complaint pending redaction  
13 agreement with the assignment judge.

14 What did you mean by that?

15 A. What I meant by that is that this email was following up  
16 on a telephone conversation I had with Mr. Kriss approximately  
17 30 minutes earlier and during the course of that conversation  
18 I informed Mr. Kriss that the best practices dictated that I  
19 attempted to file the SDNY complaint under seal, which I had  
20 attempted to do ex parte, and that I followed the procedures  
21 to that and that the Part One Judge I was given to whom I  
22 submitted a motion along with a brief in support of a motion  
23 requesting a seal -- that would be Judge Kimball Wood --  
24 declined without reason to seal it and because of the time it  
25 took for her law clerks to go through everything and for her

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1 to then decline to seal it, it ran past the closing date for  
2 the time for the cashier which I had to come back and file in  
3 the morning and drop off the copy and within 24 hours upload  
4 it to PACER.

5           So, I told Mr. Kriss that since best practices  
6 covering me as plaintiff's attorney would indicate that I  
7 attempt to file the complaint under seal and since I had  
8 already been turned down by a Part One Judge that had not got  
9 a spun wheel yet and an assigned judge, it was my belief that  
10 if at least one defendant, ideally more than one, would join  
11 with me in a stipulated motion to file under seal it would  
12 then be reasonable to go to a new Part One Judge without judge  
13 shopping and say, your Honor, we would like this filed under  
14 seal by stipulated agreement.

15           So, my purpose in contacting Ron Kriss was the same  
16 purpose I had in contacting John Elzufon an hour earlier, at  
17 10:30, I think, that morning, which was to say to them that I  
18 wanted to file the complaint under seal for reasons listed in  
19 the sealing motion and that I was turned down, but that I  
20 believed if someone stood next to me from the defendant's side  
21 with a stipulated request to file under seal that perhaps that  
22 would work.

23 Q.   Mr. Oberlander, why did best practices dictate that you  
24 file a civil RICO complaint under seal?

25 A.   For one thing these companies of Bayrock are a

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1 partnership and the -- for tax purposes and the crux of the  
2 complaint is that Mr. Doe, Julius Schwartz with the conspiracy  
3 of professionals ran Bayrock through a pattern of rampant tax  
4 evasion, tax fraud, money laundering, and when you play games  
5 like that in a tax partnership you are propagating  
6 consequences to every single one of the partners, including  
7 the innocent minority partners, and it was my interpretation  
8 that given the financial information that was in the complaint  
9 even though nominally it would appear to be related to  
10 Bayrock, it had sufficient impact on the tax partners of  
11 Bayrock that it triggered, I think it's 21F, I'm not sure, of  
12 the ECF filing that says while you don't have to file under  
13 seal information, complaint or documents that contain the  
14 following, you probably should, and, if I'm not mistaken, on  
15 the list of those things that the court recommends attempted  
16 to be filed under seal are documents containing personal  
17 financial information. That was one reason.

18 Q. Were there any other reasons?

19 A. Yes, there were. There are emails in the complaint and  
20 while I am certain that they are properly used and not subject  
21 to objection and the reasons for that are stated in the moving  
22 papers for filing under seal, I believe that best practices  
23 requires in a case of this gravity that the opposing side in  
24 the interest of justice be given a chance to examine the  
25 complaint and see if they had, for example, privilege

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1 objections, in which case there could be a period of maybe a  
2 week or two while the complaint stayed under seal pending a  
3 redaction agreement. That's what I was explaining to  
4 Mr. Kriss, that's what I was explaining to Mr. Elzufon and  
5 that's what is in my moving papers to put it under seal and in  
6 fact that's what Morris and Cohen, representing Mr. Schwartz,  
7 and I believe although it should be impossible conflict, also  
8 representing Bayrock Group, specifically requested of me  
9 within days of filing if I would agree to redaction. So,  
10 apparently they have the same view of it as I do.

11           The third reason for wanting to file under seal is  
12 because this is a derivative action and while there are about  
13 five or six known equity class members that are represented by  
14 Mr. Kriss since Bayrock must be assuming even a fraction of  
15 these complaints, claims in the complaint are true. Since  
16 Bayrock must be and must have been for sometime insolvent,  
17 there are a staggering number of creditors who have quasi  
18 equity standing to participate in a derivative action as  
19 beneficiaries and to the extent that filing the complaint  
20 prior to giving a chance for redaction would destroy what was  
21 left of the company based on public reaction to it the  
22 interest of my own derivative, albeit unknown clients, the  
23 better part of the -- it was to attempt to redact and preserve  
24 value of the company so that people out in the world reading  
25 this wouldn't shoot against it.

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1 Q. Were there any other reasons you made a motion to file it  
2 under seal?

3 A. Those were the three motions.

4 Q. Does that motion exist in writing?

5 A. Of course it does.

6 Q. Do you still have a copy?

7 A. Yes, I do.

8 Q. Does that motion in any way contain any references to the  
9 fact that there are sealed documents related to a criminal  
10 case attached to the SDNY complaint?

11 A. I'm virtually certain that it doesn't because 21F, in  
12 fact, when you read it and it lists the documents -- rather,  
13 the information which might give a reasonable attorney pause  
14 to think about attempting to seal. I believe the very last  
15 one is if your document contains information about a  
16 cooperation agreement with the government. I presume from  
17 reading that mine was not the only document ever filed that  
18 contained a cooperation agreement that the government had.

19 Q. I'm sorry, I'm confused and not familiar with 21F. Does  
20 21F permit you to file such a document or tell you to file it  
21 under seal?

22 A. Neither. Actually, it simply says there's no restriction  
23 whatsoever against filing it under seal, but you might want to  
24 think about it.

25 THE COURT: Excuse me. What is 21F?

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1           THE WITNESS: I apologize, your Honor. There are ECF  
2 rules published by EDNY and SDNY, jointly electronic filing  
3 rules, and they refer to filing of all documents, not merely  
4 complaints, and I'm pretty certain, it is funny -- again I  
5 apologize, but there are two sets of rules, two so I'm  
6 assuming it is 21E and -- whatever they are they are back to  
7 back.

8           One says if your document contains any of the  
9 documents you may not file it electronically or I guess  
10 without court order or court permission. So, that would be  
11 according to Ms. Moore's questions you are prohibited from in  
12 the absence of extenuation filing. Following that I think is  
13 21F, which contains a list of items which if your document  
14 contains them you are perfectly free to file under seal, but  
15 if I can paraphrase you probably ought to think about it  
16 before you do that and consider attempting getting it sealed.

17           THE COURT: Among the documents listed are  
18 cooperation agreements?

19           THE WITNESS: Indeed.

20           THE COURT: Yes?

21           THE WITNESS: Honestly, yes.

22           THE COURT: Presentence reports?

23           THE WITNESS: No.

24           THE COURT: Cooperation agreements?

25           THE WITNESS: Two-word phrase cooperation agreement,

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1 if it doesn't say that, it says something like -- evidence in  
2 cooperation with the government. May say cooperation  
3 agreement. Yes, it is very clear what it refers to. It  
4 does.

5 THE COURT: Does it also refer to proffer agreements,  
6 which are essentially almost synonymous with cooperation  
7 agreements?

8 THE WITNESS: No, it does not, no.

9 THE COURT: You indicated earlier I believe you had  
10 no idea, if I'm paraphrasing correctly, what a sealed case is,  
11 what sealing encompasses and so on. Do you recall that?

12 THE WITNESS: No, I apologize.

13 THE COURT: You never said anything like that?

14 THE WITNESS: No, no. The words are similar to what  
15 I said, that I certainly would never have said more than I  
16 mean to say, that I don't know what it means when a case is  
17 put under seal. Of course, I know what it means when a case  
18 is put under seal. I believe Ms. Moore was asking me what  
19 documents I knew to be part of the sealed -- whatever you want  
20 to call it. There is a sealed, what is it, envelope? However  
21 your Honor wishes to refer to it. Assume in an average case  
22 there are some documents that are sealed and some that are  
23 not. In this case it may be all documents.

24 Ms. Moore has generally been asking me or in fact  
25 entirely been asking me did you know this document was sealed,

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1 did you know that one and I said no, but if you're asking me  
2 do I know what it means when a court orders a case sealed,  
3 yes, of course I do and I apologize for any confusion.

4 THE COURT: Do you understand that it means that the  
5 case generically, meaning everything connected with that case,  
6 is sealed? The case is sealed, what does that mean?

7 THE WITNESS: May I answer? I would very much like  
8 to answer that.

9 THE COURT: By all means.

10 THE WITNESS: All right. In this particular case,  
11 not having seen the sealing order, I certainly can't comment  
12 on what any -- in general, my understanding is that when a  
13 judge orders a case sealed that the order at a minimum directs  
14 court personnel to remove the documents that are subject to  
15 the sealing order from the publicly available file to keep  
16 them sequestered somewhere, somewhere I guess in a safe of  
17 some kind, to decline to release them to any member of the  
18 public or anyone else asking for them who doesn't have a court  
19 order and that a sealing order will typically, but not  
20 necessarily, also include an order of the Court in the nature  
21 of an injunction enjoining certain parties for that action  
22 from disseminating some or all of the same documents.

23 That would be my generic understanding of what a  
24 sealing order is. It is not in rem, could not be in rem. It  
25 is directed to court personnel not to disclose and directed



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1 sometimes but not all the times the parties not to disclose.  
2 It specifically is not a gag order nor could it purport to be,  
3 but again for clarity I don't know what the order says.

4 If I may, there is one case with which I'm familiar  
5 that says it probably more eloquently than I can. It is from  
6 the Supreme Court of Kentucky. It is in the June 14th letter  
7 and it says that a sealing order of the type I described, what  
8 we call generic in this question, is not to be interpreted to  
9 be a global gag order, not to be interpreted as any form of  
10 court order purporting to control the ability of somebody to  
11 obtain the same information outside the court process.

12 THE COURT: We're talking about two different things,  
13 Mr. Oberlander. If a case is declared to be a sealed case and  
14 court personnel are instructed this case is to be kept under  
15 seal, you understand that to mean that court personnel are  
16 precluded from making any information pertaining to that case  
17 available to anybody. I don't know what the Kentucky court  
18 was dealing with, nor do I particularly care, the fact of the  
19 matter is that your understanding is correct, that when a case  
20 is declared to be a case filed under seal it directs court  
21 personnel that this case is not to be made available to  
22 anybody except under court order, which means in effect that  
23 it is globally unavailable to anybody unless a court orders  
24 it, directs it to be unsealed.

25 So, when you went to PACER, whenever it is you did,

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1 you saw this was a sealed case and when Mr. Lerner went to the  
2 Clerk's office and requested to see the file, he was told, as  
3 he told me in a letter addressed somewhere along in this case,  
4 that the Court Clerk said, "Sorry, this case is under seal and  
5 we cannot disclose anything about this case to you." That is  
6 what you were told or at least you told me that in the letter.

7 MR. LERNER: My letter said I went to the Clerk's  
8 office to obtain a copy of the sealing order. I was unable to  
9 obtain a copy of the sealing order.

10 THE COURT: You were told even that's under seal.  
11 They couldn't show you that?

12 MR. LERNER: That is correct.

13 THE COURT: Because it is the entire envelope under  
14 seal in the vault of the Court together with everything else  
15 that's filed. Now, it is true there were six documents which  
16 were also specifically marked under seal, but when the court  
17 is authorized, a Judge of the court would be authorized to  
18 access that sealed case, there are many entries which are  
19 ministerial which the Court is told a letter has been sent or  
20 whatever it is, an adjournment has been granted, but there are  
21 some documents which are specifically filed under seal, so  
22 even the Court can't look at it unless it makes a request to  
23 see what that document is and asks the clerk, Clerk of the  
24 Court, to open the vault and let me see what docket number 36  
25 is.

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1 In the course of the proceeding it may have some  
2 specific value for the Court's information but it is globally  
3 sealed. It is not addressed to any particular person. It  
4 couldn't be. The Court wouldn't know in advance who it is  
5 that might want to look at this file. The Clerk of the Court  
6 is told this case is sealed and without permission of the  
7 Court it shouldn't be disclosed to anybody.

8 Why don't you move on, Ms. Moore.

9 BY MS. MOORE:

10 Q. Just to clarify, Mr. Oberlander, it is your understanding  
11 when a document is under seal that doesn't happen on its own,  
12 right, it is pursuant to court order? Is it your  
13 understanding the court needs to order a document to be under  
14 seal?

15 A. I would not technically -- because I believe once a court  
16 orders generally documents filed it doesn't then order each  
17 individual document. You just -- as a matter of course as you  
18 file it becomes sealed. But generally at one time or another  
19 somebody somewhere on behalf of the court with authority to do  
20 so must have written that order directly to keep some or all  
21 documents under seal in order for it to be true as a statement  
22 that such and such a document is sealed.

23 Q. It is not limited to court personnel. Your order before  
24 Judge Kimball Wood, you would understand it to mean you  
25 couldn't further disseminate the document, could you, if it

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1 had been signed?

2 A. You mean the proposed order?

3 Q. Yes.

4 A. I have to look at it. I drafted the thing quite some  
5 time ago, but, yes, the object of the court order could  
6 variably be any party over whom the Court at the time of the  
7 order had personal jurisdiction sufficient to justify -- we  
8 don't need to go into a constitutional Rule 65 speech. You  
9 understand. We both understand.

10 Q. But it is your testimony that no part of your application  
11 before Judge Wood related to the fact that you were attaching  
12 documents that were under seal in the Eastern District of New  
13 York?

14 A. I haven't seen it in a few weeks. I truly don't recall  
15 that I did that. If I did, it is my memory error, but  
16 certainly that sealing order -- I mean it is easily -- you  
17 know, I can find it when I get back to my office, but to the  
18 best of my recollection I believe that the motion said --  
19 actually, it doesn't -- it could be read possibly like that  
20 because it does refer to information that is privileged and  
21 confidential. Let's rephrase it. I will not quote from  
22 something not in front of me.

23 It would be impossible to read it that way. I didn't  
24 necessarily intend to write it that way. I don't recall  
25 specifying that there were documents in there that would be

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1 under seal nor could I possibly have done so in any sense of  
2 reality I have because I continue to testify that I still to  
3 this day have absolutely no idea what documents are and aren't  
4 under seal so I couldn't have said that, your Honor, meaning  
5 whatever the Part One Judge says there are documents that are  
6 under seal here because that would contradict what I'm  
7 saying. So --

8 Q. Mr. Oberlander, how can you possibly still say that?  
9 We've gone over the PACER report that says the case is under  
10 seal repeatedly. It is clear that every document connected  
11 will be under seal. How can you still sit there and say to  
12 this day you don't know which documents are under seal or  
13 aren't?

14 A. Because I'm a mathematician, I'm an attorney, I listen to  
15 your questions and those are the truthful, correct answers to  
16 the way you're phrasing them. I have no personal knowledge of  
17 what documents are or are not sealed. That would remain my  
18 answer.

19 Q. After Judge Wood denied your order, your application to  
20 file the SDNY complaint and its attachment under seal, you  
21 filed it anyway, didn't you?

22 A. Yes.

23 Q. You did so knowing it contained information that could  
24 possibly endanger my client's life, did you not?

25 MR. LERNER: Objection.

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1 THE COURT: Sustained.

2 Q. Well, based on the documents you attached you knew that  
3 my client had cooperated against dangerous organized crime  
4 defendants; is that correct?

5 A. Documents attached to what?

6 Q. To the complaint, the cooperation agreement and proffer  
7 agreement attached to the complaint.

8 A. I've continued to testify that anything I did or didn't  
9 know is work product and that complaint represents the  
10 allegations and averments of the clients that I represent.  
11 Mr. Kriss, in principal, is the most aggrieved of all of  
12 them. Anything said in there cannot fairly be imputed to me.  
13 It is, frankly, none of my business to believe or not  
14 believe. It is my business to advocate within the constraints  
15 of Rule 11 foundation for pleading -- Rule 11 I think it is.

16 Q. Mr. Oberlander, the Professional Rules of Conduct permit  
17 you to waive work product and attorney-client privileges to  
18 defend yourself against accusation of misconduct. Let me make  
19 it clear we are accusing you of misconduct in connection with  
20 your actions in this case in filing these sealed documents and  
21 doing so in a way that would endanger a man's life.

22 Do you wish to pursuant to the Rules of Professional  
23 Conduct avail yourself of your ability to waive work product  
24 to answer those questions?

25 A. No.

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1 MR. LERNER: Objection.

2 THE WITNESS: Are you going to object?

3 MR. LERNER: I object. It is beyond the scope of  
4 this order to show cause.

5 THE COURT: Overruled.

6 MR. LERNER: If Ms. Moore wishes to refer this to a  
7 disciplinary committee, as to which Mr. Oberlander is  
8 admitted, that would be the proper forum for such  
9 allegations.

10 Q. Mr. Oberlander, are you going to stand by your answer  
11 that the answer to my question is work product privilege?

12 A. Which question?

13 Q. The question as to whether or not you knew that by  
14 attaching the cooperation agreement to a civil RICO complaint  
15 in the Southern District would potentially endanger my  
16 client's life.

17 MR. LERNER: Objection.

18 THE COURT: I sustained an objection.

19 Q. Mr. Oberlander, if you would take a look, please, at  
20 Exhibit A to Movant's Exhibit 1, which is in fact the  
21 cooperation agreement and I would like to direct your  
22 attention to paragraph ten of that agreement.

23 A. Yes.

24 Q. That paragraph references the Witness Protection  
25 Program. Did you read that paragraph prior to filing this

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1 complaint?

2 A. I did.

3 Q. And you fancy yourself as somewhat of an authority in  
4 criminal court; is that correct?

5 A. No. In fact, I told you I'm not a criminal lawyer.

6 Q. Well, do you have any understanding whatsoever of when a  
7 cooperation agreement might include provisions with respect to  
8 Witness Security Program?

9 A. Do I have any understanding of when it would include  
10 one --

11 Q. Yeah.

12 A. Presumably when the parties negotiate it to include one.

13 Q. Do you have an understanding of what that program is?

14 A. From popular culture.

15 Q. And you had no concern by attaching this cooperation  
16 agreement, no concern whatsoever about doing that?

17 A. Hypothetically I'm not waiving anything, but  
18 hypothetically if I had my concerns it would have been limited  
19 to the safety of Mr. Kriss, who Mr. Doe threatened with death,  
20 would have been limited -- the answer to your question is  
21 hypothetically if I had given it any thought the answer I  
22 would have come up with would have been I'm not Mr. Doe's  
23 guardian angel, I'm Mr. Kriss'.

24 Q. When we first spoke to Judge Buchwald on May 13th, you  
25 were represented on that telephone conversation by attorney



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1 named David Lewis; is that correct?

2 MR. LERNER: Objection.

3 THE COURT: I think it is referred to in the papers  
4 that have been submitted, Mr. Lerner.

5 THE WITNESS: Does that mean answer?

6 THE COURT: Yes.

7 A. Yes, I was.

8 Q. When did you retain Mr. Lewis to represent you in  
9 connection with the matter before Judge Buchwald?

10 A. Mr. Lewis and I have been friendly for 45 years. I  
11 originally began consulting him in this matter in 2000 and --  
12 2009. I don't have a formal retainer agreement or engagement  
13 letter. A relationship of almost half a century, sporadic. I  
14 just can't answer that, but the point is that Mr. Lewis has  
15 been with me in this matter for well over a year before that  
16 phone call.

17 Q. He's not still with you, is he?

18 THE COURT: Ms. Moore, we're going kind of far  
19 afield.

20 MS. MOORE: Okay, your Honor.

21 THE COURT: Excuse me. We're going a little bit far  
22 afield. Not a little, perhaps a little bit more than a little  
23 far afield here with respect to what this proceeding is about,  
24 as I understood it when the initial order to show cause was  
25 presented to me. So, why don't we just stick with that.

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1           There are inferences which the Court can draw with  
2   respect to what is specifically in the complaint and whether  
3   Mr. Oberlander was aware of what it is he alleged in the  
4   complaint.

5           MS. MOORE:   Yes, your Honor.

6           THE COURT:   That complaint specifically refers to  
7   documents which were sealed.  Whether Mr. Oberlander  
8   understood or didn't understand what that means or whether  
9   that was his words or his client's words may be something for  
10  me to deal with.

11          MS. MOORE:   Understood, your Honor.

12   Q.   Mr. Oberlander, Judge Buchwald did issue an order on May  
13   13th ordering there be no further dissemination of the  
14   complaint or the exhibits attached thereto.

15          Do you recall that order?

16   A.   I do.

17   Q.   And then the following day she issued another order, is  
18   that correct, ordering that the entire complaint be placed  
19   under seal and that it be redacted in a fashion to remove all  
20   references to the sealed and confidential documents; is that  
21   correct?

22   A.   No.  Not by my recollection, no.  That's distorted.

23   Q.   Why don't we take a look at that order.

24          MS. MOORE:   Exhibit 4, your Honor.

25   A.   If you're referring to sua sponte order of approximately

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1 three o'clock that Friday, I --

2 THE COURT: Exhibit what?

3 MS. MOORE: Four, your Honor.

4 THE COURT: Four?

5 MS. MOORE: Yes, Judge.

6 MR. LERNER: May I have a copy?

7 MR. SNIDER: Of course.

8 Q. Directing your attention to the second page.

9 A. I understand. I misunderstood your original question.  
10 If I can correct my answer or you can rephrase? I understand  
11 what happened here.

12 Q. Did you understand that Judge Buchwald on the 14th  
13 ordered the entire complaint to be sealed and that it be  
14 redacted to remove any references to the sealed documents and  
15 the documents themselves?

16 A. To be precise, she ordered the original complaint sealed,  
17 it says pending further order of the Court and a redacted  
18 version. My misunderstanding of your prior question was that  
19 I assumed originally it would refer to redacted version. I  
20 was confused. Yes, we are in agreement that's what she  
21 ordered except that her sealing order is pending further  
22 instruction.

23 Q. There was another order from Judge Glasser on May 18th  
24 that also enjoined you from disseminating the sealed and --  
25 confidential materials and the information therein; is that

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1 correct?

2 A. I don't recall exactly what it said. It was not served  
3 on me personally, but I assume that's correct in sum and  
4 substance. You don't have to show it to me. I will stipulate  
5 to that.

6 Q. Despite that, Mr. Oberlander, you intended to file  
7 redacted versions of that complaint that in fact referenced  
8 the information in those sealed documents; is that correct?

9 A. I what?

10 Q. You intended to file redacted versions of that complaint  
11 that did reference the information that was in those sealed  
12 materials; is that correct?

13 A. I'm sorry, that's ridiculous. You mean did I ever form  
14 the intent to file a redacted version? I formed the intent  
15 the moment I received this order because I was told to. I  
16 held that intent all the way through until the time a few days  
17 later when Mr. Lewis told me we may have a problem here  
18 because this order may wind up in conflict with Judge  
19 Glasser's order, so he would write to Judge Buchwald, which I  
20 believe occurred that Tuesday or Wednesday following this and  
21 he would write to Judge Buchwald and say maybe -- or maybe  
22 call her and say maybe you ought to just stop any uploaded or  
23 redacted version until Judge Glasser finishes what he's  
24 doing. And my recollection is that Judge Buchwald wrote back  
25 and said I don't see why there would be confusion, but I

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1 certainly have no objection to extending my original  
2 prohibition against uploading until Judge Glasser is done. So  
3 that to be absolutely clear here from the moment I received  
4 notice of this order telling me to upload I had the intent to  
5 do so and complying with it all the way through until the time  
6 Judge Buchwald said never mind.

7 Q. Let me back up a second, Mr. Oberlander. The application  
8 that Mr. Lewis actually made to Judge Buchwald stated Brian  
9 Herman of Morgan Lewis in an email last night stated that  
10 Judge Buchwald's and Judge Glasser's orders are much broader  
11 than I understood them to be. Further, Mr. Herman stated that  
12 we will consider any reference to the exhibits or information  
13 contained therein in any way to be a violation of the orders  
14 and will seek immediate relief.

15 As a consequence, Judge Glasser's order is a change  
16 in circumstances, such that complying with this court's order  
17 to file a redacted complaint appears to violate a sealed order  
18 of Judge Glasser.

19 The response to that, what Judge Buchwald actually  
20 wrote was: While I do not understand how you could have  
21 interpreted my earlier orders to permit, quote, any reference  
22 to the exhibits or information contained therein, I have no  
23 objection to delaying the filing of a redacted complaint until  
24 Judge Glasser rules on the sealed documents issue pending  
25 before him.

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1           My question, Mr. Oberlander, is prior to receiving  
2   that letter from Judge Buchwald, it was in fact still your  
3   intention to file a redacted version of the complaint that  
4   would still reference the information that was contained in  
5   the sealed documents; is that correct?

6   A.   Of course it is not. That's offensive. You're asking me  
7   if I formed the intent to violate this order. I did not ever.

8   Q.   Mr. Oberlander, there was a courthouse news article that  
9   went out after Judge Buchwald resealed this entire complaint.  
10   Did you speak to the reporter who wrote that article?

11   A.   Never.

12           THE COURT: I think the court reporter would like to  
13   rest her fingers for a few minutes. Why don't we do that.

14           (Recess taken.)

15           THE COURT: Are we ready to proceed?

16   MS. MOORE: Yes, your Honor.

17   THE COURT: Mr. Oberlander.

18           (The witness resumes the stand.)

19   THE COURT: Ms. Moore.

20   MS. MOORE: Thank you, your Honor.

21           THE COURT: Before you proceed, Mr. Oberlander, my  
22   law clerk advises in the first place we have no rule in the  
23   Eastern District which resembles 21F, we have no Rule 21.

24           THE WITNESS: It is not a local rule; it is an ECF  
25   rule.

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1 THE COURT: I thought I heard you say the Southern  
2 and Eastern District Rule 21F. If I misheard, I would  
3 apologize to you.

4 THE WITNESS: Not necessary.

5 THE COURT: But we have pulled down "Electronic Case  
6 Filing Rules and Instructions" --

7 THE WITNESS: It should be in there.

8 THE COURT: -- "of the United States District  
9 Court for the Southern District of New York." There is  
10 no Rule 21F.

11 THE WITNESS: I have the number wrong.

12 THE COURT: Just bear with me.

13 There is a rule, it is 21.4. Certain sensitive  
14 personal information should not be included, such as social  
15 security number, names of minor children, dates of birth,  
16 financial account numbers, home addresses.

17 Question: Is there other sensitive information that  
18 I should consider redacting? The answer is yes. Caution  
19 should be exercised when filing documents that contain the  
20 following: And among the list is information regarding an  
21 individual's cooperation with the government. It doesn't  
22 refer to cooperation agreement. Information regarding an  
23 individual's cooperation with the government.

24 There is no 21F and this is the only reference in  
25 this document which is "Electronic Case Filing Rules and

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1 Instructions of the Southern District," August 1st, 2008  
2 edition and apparently we have no comparable rules here. But  
3 it is information regarding an individual's cooperation with  
4 the government, not restricted to a cooperation agreement.

5 Why don't you proceed, Ms. Moore.

6 BY MS. MOORE:

7 Q. Mr. Oberlander, let me show you as a housekeeping matter  
8 the version of the complaint that you offered, that you filed  
9 in Southern District.

10 THE COURT: I'm sharing this with Mr. Lerner. He'll  
11 share it with you, when he's finished. Mr. Lerner, do you  
12 want to look at this? Do you have a copy of it?

13 MR. LERNER: I will look at it after Ms. Moore looks  
14 at it.

15 THE COURT: It is 21.4, if it is the same document.

16 Go ahead, Ms. Moore.

17 Q. Mr. Oberlander, I show you Exhibit 11, which is the  
18 version of the complaint.

19 THE COURT: I think the microphone has been turned  
20 off.

21 Q. I've handed you what is the version of the complaint that  
22 was actually filed in the Southern District. That's the  
23 version that you signed; is that correct?

24 A. If this is that version, I signed it.

25 Q. Why don't you take a look, Mr. Oberlander.



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1 A. Yes. It has my signature page on it. It is illegible.  
2 I certainly signed whatever I handed in. If this is in, yes.

3 Q. Did you personally type this document?

4 A. I mean enter it on a computer. Did I type it?

5 Q. Yes. Every word? Including the words relating to the  
6 documents that were sealed?

7 A. You're asking me did I have anyone else other than me  
8 physically at the keyboard?

9 MR. LERNER: Objection, it has been asked and  
10 answered.

11 THE COURT: Sustained.

12 Q. Mr. Oberlander, as you sit here today, what is your  
13 current understanding of whether or not you can or should use  
14 the proffer agreements, cooperation agreement, presentence  
15 report, criminal complaint, information or any other documents  
16 that relate to the criminal case against my client in the  
17 Eastern District of New York?

18 MR. LERNER: Objection, your Honor. It is outside  
19 the scope of the order to show cause. It is also irrelevant.

20 MS. MOORE: Your Honor, I believe it is directly  
21 relevant to what relief the Court should grant going forward  
22 and what the order needs to say for Mr. Oberlander to  
23 understand that he should not be using these documents or the  
24 information contained therein.

25 MR. LERNER: The only relief that is --

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1 THE COURT: I believe, Mr. Lerner, that it is very,  
2 very pertinent for the Court to know whether or not when  
3 Mr. Oberlander filed this complaint in view of his testimony  
4 that he was familiar with the ECF filing cautionary  
5 instructions, that the question is appropriate and I will  
6 permit him to answer it.

7 Do you want the question rephrased or reread,  
8 Mr. Oberlander?

9 THE WITNESS: If I ask what I'm confused -- may I  
10 ask --

11 THE COURT: Why don't we have Ms. Moore put the  
12 question to you again.

13 Q. Mr. Oberlander, as you sit there today, do you believe  
14 that you in any way used the proffer agreements, cooperation  
15 agreement, presentence report, complaint, information or draft  
16 information or any other documents that were filed in  
17 connection with the criminal case against my client in the  
18 Eastern District of New York in any way, shape or form?

19 MR. LERNER: Your Honor, I would just like to  
20 clarify this, that there's presently an order to show cause  
21 that bars him from doing just that. So, if the question  
22 presupposes there's no such order, I think that question can  
23 be answered.

24 THE COURT: I'm going to sustain an objection to  
25 form. It is not "did you." At the time the complaint was

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1 filed.

2 Q. Did you understand at the time the complaint was filed  
3 that you should not have used the proffer agreements, the  
4 cooperation agreement, the presentence report, the criminal  
5 complaint that is referenced in the complaint, did you  
6 understand that you should not have used those documents in  
7 connection with drafting and filing that complaint?

8 A. Of course I wouldn't have understood that because that  
9 isn't the law. There is no proscription the way you said  
10 there is. You're asking me if I understood that I was legally  
11 prohibited from doing what I did. Of course I did not. The  
12 reason I did not is to the best of my understanding in no way,  
13 manner, shape or form were there any court orders of any kind  
14 with jurisdiction over me prohibiting it at the time I filed  
15 the complaint.

16 Q. At this time, as you now know that the entire criminal  
17 matter is under seal, which includes the court appearances,  
18 and the documents filed in connection therewith, what is your  
19 understanding as to whether or not you have a legal right or  
20 ability to use any of those documents or the information in  
21 those documents in any way?

22 A. My understanding -- assuming that the order to show cause  
23 with the encapsulated temporary restraining order reevaporated  
24 tomorrow and no other orders were issued that I'm aware of,  
25 that I'm not aware of now and my understanding of my legal

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1 right to, quote, use it, unquote -- first, for clarification,  
2 may I presume by use you mean use the information, not just  
3 the actual physical documents, is that what you meant by the  
4 term use?

5 Q. Yes.

6 A. All right. My understanding of my legal right would be  
7 that I have the same right to speak or disseminate them  
8 subject to any validly issued, served court order telling me  
9 not to, and that I would have the right to object to such a  
10 court order which, of course, I would respect to the extreme,  
11 that there is no order in existence of any kind under Rule 65B  
12 or any constitutional standard of due process, Fourteenth  
13 Amendment, that restricts me from using them, the information  
14 in it, and that there is no court order with which I could  
15 have possibly been charged with -- it is coming out -- let me  
16 rephrase that.

17           There are no court orders nor were there nor are  
18 there now other than the temporary restraining order that  
19 prohibits me from using the information I obtained. That's my  
20 legal right. Otherwise, with respect to the information in  
21 the PSR, I stand by what I just said, but it would be my  
22 intention now to request formal permission to unseal certain  
23 other documents which I presume are there and I would prefer  
24 to use them.

25           So, if that's complex, I apologize, but my

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1 understanding is that there is no nor has there ever been any  
2 court order with any in personam effect over me regarding any  
3 of those documents.

4 Q. Mr. Oberlander, you understand now, certainly, that there  
5 is a court order that places this entire case under seal, do  
6 you not?

7 A. I understand that that court order doesn't run in rem.  
8 There is no such thing. That has been the law in this Circuit  
9 for almost 70 years. Supreme Court upheld that court orders  
10 and such things don't run in rem, they run in personam and  
11 constitutionally cannot apply or restrain activities of  
12 persons who are not either parties of that action or legally  
13 identifiable. That's Rule 65D, as well as the First  
14 Amendment.

15 So, to the extent that I presume the Court certainly  
16 did order the files sealed, that order and its in personam  
17 effect does not touch me. It certainly would touch me if I  
18 obtained them from the court improperly and aided and abetted  
19 a court order in breaking a seal, but none of that happened.

20 Q. Doesn't the order apply to the documents themselves?

21 A. Of course not. There is no in rem court order. They are  
22 in personam court orders. I can give you cases to that effect  
23 in the 2d Circuit.

24 Q. What is it going to take in the form of an order for you  
25 to understand that you cannot use the documents you obtained

Oberlander-direct/Moore

1 on March 3rd from Josh Bernstein --

2 MR. LERNER: Objection.

3 Q. -- or the information in them?

4 THE COURT: The objection is sustained.

5 Ms. Moore.

6 MS. MOORE: One more question, your Honor.

7 Q. Mr. Oberlander, is it your position with respect to  
8 whether or not you can or can't use documents ordered under  
9 seal the same regardless of whether or not they were stolen?

10 A. Are you asking me for a hypothetical legal opinion in my  
11 capacity as an attorney on what the law would be? My answer  
12 would be that to the extent that the person receiving them  
13 either, A, did not know that they were stolen; B, had no  
14 reason to know; or, C, according to the latest Supreme Court  
15 ruling actually did know, but was merely a passive recipient  
16 of those documents. There is a First Amendment and they may  
17 be used certainly if they contain information in the public  
18 interest. And my understanding of such information pertains  
19 to matters of criminal trials. Is that the absolute foremost  
20 heightened respected First Amendment right of access to  
21 documents in criminal charges is to documents containing plea  
22 agreements and sentencing arrangements.

23 MS. MOORE: Your Honor, I have no further  
24 questions. I do have an application. Mr. Oberlander  
25 referenced a written motion he made to Judge Wood attempting

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1 to seal the SDNY complaint and I would like a copy of that  
2 written application.

3 I also question whether or not the email of March 3rd  
4 that forwarded those -- the documents was in fact  
5 attorney-client privilege. I would ask that it perhaps be  
6 provided to the Court in camera for inspection as to what that  
7 sentence says and whether or not that is relevant to these  
8 proceedings.

9 THE WITNESS: I have no problem.

10 THE COURT: All right.

11 MR. LERNER: No objection.

12 THE COURT: So ordered.

13 MR. LERNER: May we forward the motion -- we'll  
14 discuss the logistics of the in camera inspection after.

15 THE COURT: Do you want to inquire, Mr. Lerner?

16 MR. LERNER: Yes, your Honor.

17 MR. LERNER: May I approach?

18 THE COURT: Please.

19 CROSS-EXAMINATION

20 BY MR. LERNER:

21 Q. Mr. Oberlander, these are the documents that were  
22 attached to the email we have been discussing, the March 3rd  
23 email.

24 MS. MOORE: Can I have a copy, please?

25 THE WITNESS: You can have these. I've seen them

Oberlander-cross/Lerner

1 enough now. At least for purposes of what's going on here, be  
2 my guest.

3 Q. Mr. Oberlander, could you recite for the court reporter  
4 what's in the materials?

5 THE COURT: Can we mark these for identification as  
6 Defendant's A.

7 MR. LERNER: Correct, yes, your Honor.

8 THE COURT: I don't know how many documents there  
9 are.

10 THE WITNESS: There are three.

11 THE COURT: I'm sorry.

12 THE WITNESS: Three, your Honor.

13 THE COURT: Including the cover page of the email.

14 THE WITNESS: No, no, these are just documents.

15 THE COURT: Three documents that will be marked  
16 collectively as Defendant's Exhibit A.

17 Go ahead, please, proceed.

18 Q. Mr. Oberlander, these documents, they include the  
19 document labeled proffer agreement, cooperation agreement, and  
20 what we have been referring to as the PSR or presentence  
21 investigation report. I would like to hand you first the  
22 proffer agreement and ask you simply whether there's anything  
23 on that document that indicates that it is subject to a  
24 sealing order of any sort?

25 A. There is not.



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1 Q. I would like to hand to you the document that is labeled  
2 cooperation agreement and pose to you the same question. Is  
3 there anything that indicates on that that it is subject to a  
4 sealing order of any sort?

5 A. May I just clarify that attached to this is what  
6 Ms. Moore considers a separate document which is a DOJ  
7 statement. These three documents are what Mr. Bernstein gave  
8 me as he gave them to me. So, to me these will always be  
9 three. To her these are four. So, I should interpret your  
10 question as to referring to both parts of this?

11 Q. Yes, please.

12 A. There is not, no.

13 Q. And just for clarification, Mr. Oberlander, these are the  
14 documents that Mr. Bernstein handed to you rather than emailed  
15 to you?

16 A. These are the documents he emailed to me that are  
17 identical to the ones he handed to me. The ones he handed to  
18 me I have in Montauk and was not able to go back, but I  
19 compared them before and they're identical.

20 Q. I will hand you what we call PSR, presentence  
21 investigation report, and ask you if there's anything in it  
22 that indicates that it is subject to a sealing order?

23 A. No.

24 Q. I would like you to look at page two and ask you to read  
25 the language of that that has been -- that Ms. Moore quoted

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1 previously and read it in full, please.

2 A. Read it all?

3 Q. Into the record, yeah.

4 A. "Restrictions on use and disclosure of presentence  
5 investigation report." That's bold faced. "Disclosure of  
6 this presentence investigation report to the Federal Bureau of  
7 Prison and re-disclosure by the Bureau of Prisons is  
8 authorized by the United States District Court solely to  
9 assist administering the offender's prison sentence, i.e.,  
10 classification, designation, programming, sentence  
11 calculation, previous planning, escape apprehension, prison  
12 disturbance, response, sentence, commutation or pardon and  
13 other limited purposes, including deprivation proceedings and  
14 federal investigations directly related to terrorist  
15 activities. If the presentence report is re-disclosed by the  
16 Bureau of Prisons upon completion of its sentence  
17 administration function the report must be returned to the  
18 Bureau of Prisons or destroyed.

19 It is policy of the Federal Judiciary and the  
20 Department of Justice that further re-disclosure of the  
21 presentence investigation report is prohibited without the  
22 consent of the sentencing judge.

23 Q. Now, Mr. Oberlander, you did not receive this document  
24 from the Bureau of Prison, did you?

25 A. No.

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1 MS. MOORE: No further questions.

2 THE COURT: Anything further?

3 REDIRECT EXAMINATION

4 BY MS. MOORE:

5 Q. Mr. Oberlander, you just testified that the documents you  
6 obtained in person on March 3rd were identical to the ones --  
7 that you got by email March 3rd were identical to the ones on  
8 March 1st?

9 A. To the extent if comparing them casually would show  
10 that. I will not testify some letter didn't change somewhere,  
11 but they appear to be in the --

12 Q. My only question is I believe I understood your testimony  
13 to be the March 3rd email also included a sealed criminal  
14 complaint and a draft or final information; is that correct?

15 A. No, because I never stipulated the criminal complaint was  
16 sealed. Only the New York Times seems to believe that.

17 Q. You never believe anything you've read in the New York  
18 Times, right?

19 A. Well, I believe there is a Santa Claus, but that's the  
20 Herald, isn't it?

21 Q. It is.

22 A. No, The Sun. New York Sun.

23 Q. My question, Mr. Oberlander, is I'm trying to get the  
24 universe of documents that are in fact under seal in the  
25 Eastern District that are in your possession.

Oberlander-redirect/Moore

1 Do you have a complaint captioned "United States  
2 versus Klopsman (ph.) and Doe" in your possession?

3 A. I have a complaint. I don't stipulate it is sealed. I  
4 certainly have it.

5 Q. Do you have an information, either final or draft form?

6 A. Same answer, same comment.

7 Q. Do you have any other documents that relate to a criminal  
8 case that is filed in the Eastern District?

9 A. Define what you mean by related. Do you mean documents  
10 the same time that might possibly be under seal as opposed to  
11 an article in the Daily News?

12 Q. Yes.

13 A. Not to my knowledge, no.

14 MS. MOORE: Your Honor, I ask the Court's temporary  
15 retraining order be extended to include the documents we  
16 previously didn't know Mr. Oberlander also had but which are  
17 in fact also under seal.

18 THE WITNESS: No problem.

19 MR. LERNER: We have no objection to continuing the  
20 TRO.

21 THE COURT: So ordered. I'll entertain an  
22 application to enjoin permanently. TROs are good for ten days  
23 unless extended for another ten days. It would seem to me an  
24 application you might wish to be made is to enjoin the  
25 dissemination of those documents permanently.

## Oberlander-redirect/Moore

1 MR. LERNER: We'll object to that, your Honor. We  
2 prefer to do it on papers.

3 THE COURT: I conducted a hearing with respect to  
4 those papers that have been filed under seal and I'm prepared  
5 to entertain an application with respect to that. The TROs  
6 are good for only ten days, as a general rule. Of course,  
7 they could be extended continually.

8 MR. LERNER: May I consult with my client?

9 THE COURT: By all means.

10 (Pause in proceedings.)

11 MR. LERNER: Yes, we object to a permanent  
12 injunction with respect to these documents. The evidence has  
13 shown that Mr. Oberlander came into possession of the  
14 documents lawfully. It is un rebutted. There is no showing he  
15 secured them from theft. He did not obtain them from the  
16 court, he obtained them from Mr. Bernstein. That's  
17 un rebutted.

18 He stands in the same position as a newspaper may  
19 receive confidential or privileged documents, similar  
20 documents such as these. He is entitled to the same First  
21 Amendment protection as, for example, the New York Times or  
22 the Washington Post in the reported cases involving such  
23 issues.

24 I refer the Court to Washington Post against  
25 Honorable Debra Robinson, 935 F. 2d 282, wherein it was held

1 that the Washington Post which had come into possession of,  
2 quote, unquote, sealed documents and came into them without  
3 obtaining them unlawfully from the Court could use them as it  
4 sees fit.

5 We object more specifically particularly to the  
6 sealing of the cooperation agreement and the proffer  
7 agreement. There's nothing on the documents themselves to  
8 indicate that they were under seal. I refer the Court to  
9 Alamite (ph.), where the 2d Circuit held an order which is  
10 global, globally enjoins parties is of no force and effect.

11 So, your Honor, subject -- we have stated our  
12 objections. We rely on the argument set forth in our letter  
13 of May 14th -- I'm sorry, June 14th. There's no order that  
14 was binding upon Mr. Oberlander. To the extent it may be read  
15 to be binding on the world, it is of no force and effect.

16 MS. MOORE: We obviously disagree. Whatever  
17 Mr. Oberlander may have known or understood on May 10th, at  
18 this point it couldn't be clearer that these documents are  
19 under seal pursuant to court order. The Court went out of its  
20 way to impress upon the respondents the seriousness of the  
21 case.

22 At every stage of this proceeding they have continued  
23 to assert their right to use the information and the sealed  
24 documents despite now knowing in no uncertain terms that all  
25 of this has been sealed and they used the attorney-client

1 privilege with respect to Mr. Bernstein as a shield and a  
2 sword. They initially said they couldn't contact him because  
3 they misunderstood the court's order. He said it was  
4 attorney-client privilege. Then they're saying Mr. Arnold  
5 Bernstein represents him.

6           When we called Arnold Bernstein he said I don't  
7 represent him, good luck to you finding him. When asked  
8 whether or not Mr. Oberlander understood or believed they  
9 could have been stolen, he asserted work product privilege.  
10 These documents were stolen from my client and they have  
11 no right to be using them, especially knowing they were  
12 sealed.

13           We think a permanent order enjoining them from using  
14 documents and the information they improperly obtained by  
15 getting those documents from Josh Bernstein is entirely  
16 appropriate under these circumstances.

17           MR. LERNER: Mr. Doe has not testified these  
18 documents were stolen and the implication that they were  
19 stolen is just about foundation. I object to the  
20 characterization.

21           THE COURT: Let me clarify some things. There is no  
22 evidence other than the fact that Mr. Oberlander received  
23 these documents from Mr. Bernstein. Mr. Bernstein, according  
24 to Mr. Oberlander, represented to him he got documents because  
25 Mr. Doe gave them to him. I haven't heard any evidence one

1 way or the other with respect to that information.

2           With respect to the presentence report, I am issuing  
3 a permanent injunction that the information contained in that  
4 presentence report is not to be disseminated. It is not a  
5 question as to whether Mr. Oberlander knew or didn't know  
6 whether they were or weren't stolen.

7           Charmer Industries, in this Circuit, makes it  
8 painfully clear that presentence reports are not to be  
9 distributed or disseminated or disclosed to third parties. To  
10 the extent Mr. Oberlander has possession of the presentence  
11 report, I'm enjoining Mr. Oberlander from disseminating any  
12 information contained in that presentence report. The order  
13 with respect to presentence reports is not directed to any  
14 individual, it is directed to the presentence report itself.  
15 It is that document which from the point of view of the  
16 integrity of the criminal proceeding, the veracity of the  
17 information contained in presentence reports, the willingness  
18 of persons to freely provide information which finds its way  
19 into presentence reports and all the other reasons given by  
20 the 2d Circuit in Charmer Industries which make it vital that  
21 presentence reports remain in the file in terms of public  
22 disclosure which is what I'm basing my injunction on.

23           With respect to the cooperation agreement and the  
24 proffer agreement, there is no authority which I'm aware of  
25 similar to Charmer Industries with respect to cooperation



1 agreements and presentence reports, although by implication a  
2 presentence report contains an awful lot of information which  
3 is gleaned from a cooperation agreement.

4           There's another significant consideration: To the  
5 extent that Mr. Oberlander knew, and he obviously knew what  
6 sealing the document entails and what its implications are,  
7 having made an application to have a document sealed in the  
8 Southern District of New York, and in addition to which there  
9 was reference made to what appears to be a nonexistent Rule  
10 21F, but what he was referring to quite clearly is that  
11 caution should be exercised when filing documents that contain  
12 information regarding an individual's cooperation with the  
13 government which would clearly include a cooperation agreement  
14 and would clearly include a proffer agreement.

15           It is not an order, but it is an advice to  
16 attorneys. It may be that if Mr. Oberlander continues, given  
17 the information he has with respect to the significance of a  
18 cooperation agreement and a proffer agreement and any other  
19 information pertaining to the defendant's cooperation with the  
20 government and continues to ignore the advice to use caution  
21 and not disseminate it, it may be some appropriate proceeding  
22 with the grievance committee or some other such proceeding  
23 might not be inappropriate.

24           I'm not enjoining it, but I am making it very plain  
25 that to the extent that a lawyer knows that the documents in

1 his possession came from a file which was sealed and knows  
2 that the information contained in those documents is  
3 information which might place the life of another at risk and  
4 knows that there is a Southern District notice regarding  
5 privacy and public access and advising him to exercise caution  
6 in disseminating information relating to a person's  
7 cooperation with the government, to the extent he will choose  
8 to ignore that caution and proceed to expand on what he  
9 believes is his First Amendment or Fourteenth Amendment right,  
10 it is a matter which he may wish to have tested in some other  
11 forum administratively or otherwise.

12 To the extent that I haven't been asked yet, this was  
13 a suggestion I made that an application to that extent may  
14 wish to be made but it hadn't been I don't think -- maybe it  
15 has been with respect to cooperation agreements and other  
16 documents.

17 I am issuing an order with respect to that  
18 presentence report and I'm relying on Charmer Industries with  
19 respect to that.

20 Insofar as the cooperation agreement and the rest of  
21 it is concerned, I think I've made my position perfectly  
22 plain.

23 MS. MOORE: Your Honor, a number of other documents  
24 in Mr. Oberlander's and possibly his client's possession are  
25 in fact under seal and I will put my client on the witness

1 stand and say they were stolen, but -- and under the  
2 circumstances I would ask the Court to reconsider having those  
3 documents returned to the Court or the U.S. Attorney's Office  
4 so they can be made use of.

5 THE COURT: Mr. Lerner, do you want to be heard on  
6 that?

7 MR. LERNER: Well, I have no objection to Mr. Doe  
8 taking the stand.

9 THE COURT: I'm not referring to Mr. Doe taking the  
10 stand. The question was an application to the Court to direct  
11 that those documents be returned to the United States  
12 Attorney's Office and to the Court to the extent that those  
13 documents were obtained from a file which was marked under  
14 seal and they were sealed documents which were not to be  
15 disclosed absent a court order disclosing them.

16 MR. LERNER: They were obtained lawfully from  
17 Mr. Bernstein, therefore, we object.

18 MS. MOORE: Your Honor, Mr. Bernstein did not obtain  
19 them lawfully from my client.

20 THE COURT: Excuse me, Ms. Moore. Stop the back and  
21 forth colloquy.

22 With respect to that I'll reserve. I will entertain  
23 a memorandum with respect to that and I will give both parties  
24 an opportunity to do that.

25 With respect to the presentence report I have

1 absolutely no hesitation in enjoining any further  
2 dissemination and I'll direct the presentence report to be  
3 returned. To the extent that you have that in your  
4 possession, return it immediately --

5 THE WITNESS: Absolutely.

6 THE COURT: -- to the United States Attorney's  
7 Office.

8 With respect to the cooperation agreement, proffer  
9 agreement and any other document which you know was obtained  
10 from a file which was marked under seal, I will entertain a  
11 memorandum with respect to that and I'll reserve.

12 Are we finished? Why don't you have Mr. Doe  
13 testify. I think that issue is very, very much at the core of  
14 this proceeding.

15 In view of the fact it is five after one, why don't  
16 we recess for lunch and resume at two o'clock.

17 Two o'clock.

18 (Lunch recess.)  
19  
20  
21  
22  
23  
24  
25

1 A F T E R N O O N S E S S I O N.

2 THE COURT: Is everybody present?

3 MR. LERNER: Your Honor, with the Court's permission  
4 Mr. Oberlander has a correction to make in his testimony and  
5 would he be permitted to correct something?

6 THE COURT: By all means.

7 THE WITNESS: Thank you.

8 THE COURT: What would you like to correct,  
9 Mr. Oberlander?

10 THE WITNESS: I don't recall the phrasing of the  
11 exact question, but Ms. Moore asked me what were the grounds  
12 that I put in my motion to seal when I went in front of Judge  
13 Wood and I believe she asked me on one or two occasions did I  
14 include in my motion notice that there were documents that she  
15 says are sealed. We all understand what she means. And the  
16 answer I gave was that no, I didn't, or I don't recall, and  
17 that's correct, but it is incomplete, because I refreshed my  
18 memory and what actually happened when I went to Judge Wood's  
19 chambers was that her law clerk first read everything and then  
20 he came out and asked me to show him the complaint and I  
21 generally did. Then he took the petition in. Judge Wood came  
22 back awhile later and said she wants to see the complaint and  
23 I picked it up and showed it to him and I said would you  
24 please make sure and tell Judge Wood this is a RICO case and  
25 that there are allegations of extreme criminal behavior here

1 and that there are documents in here relating to plea  
2 agreements. I don't remember the exact phrase I used, but it  
3 wasn't in the moving papers, but it was the equivalent of an  
4 oral statement as to the law clerk. I didn't want to mislead  
5 the Court.

6 My complete answer is the written moving papers did  
7 not include to my recollection that -- one of the bases for  
8 the request to seal was that there was a proffer or a  
9 cooperation agreement or PSR, but it was my oral request that  
10 the clerk convey to her such similar documents were there and  
11 she should take that into her determination. That was it.  
12 That's the only correction.

13 THE COURT: Did you want to inquire on that,  
14 Ms. Moore?

15 MS. MOORE: No, your Honor.

16 THE COURT: Are you ready? Are you calling Mr. Doe?

17 MS. MOORE: I am, your Honor.

18 J O H N D O E , called as the witness herein, having  
19 been first duly sworn/affirmed, testified as follows:

20 THE CLERK: Would you please state and spell your  
21 name for the record.

22 THE WITNESS: John Doe, J-o-h-n D-o-e.

23 THE COURT: Sir, be seated. Go ahead, Ms. Moore.

24 DIRECT EXAMINATION

25 BY MS. MOORE:

Doe-direct/Moore

1 Q. Mr. Doe, did you ever keep any documents in your office  
2 that were part of a sealed file at Eastern District of New  
3 York, a criminal case captioned 98-CR-1101?

4 A. Yes, I did.

5 Q. And did you keep them in a file?

6 A. Yes, I did.

7 Q. Was that file marked in any way?

8 A. Yes, it was.

9 Q. How was it marked?

10 A. Personal and confidential.

11 Q. Where did you keep that file in your office?

12 A. Bottom left-hand drawer of my desk.

13 Q. Did you keep it locked?

14 A. Most of the time, yes.

15 Q. Were there ever times it was not locked?

16 A. Yes, there were.

17 Q. Like when?

18 A. During the day, if I had to go to the restroom or if I  
19 ran to a meeting in the next office or if I stepped out for  
20 lunch. I locked my desk when I went home at night, but  
21 sometimes during the day it would be unlocked.

22 Q. Did that file contain documents along the lines of  
23 proffer agreements, cooperation agreement, presentence report  
24 information, criminal complaint?

25 A. Yes, it did. I did not remember how many of the items

Doe-direct/Moore

1 you just mentioned were in there. It is possible all of them.

2 Q. Way did you keep that file in your office?

3 A. I was constantly speaking to my attorneys about my case  
4 and I needed to have readily available files regarding that  
5 case.

6 Q. Did you also keep that file at your home?

7 A. No, I did not.

8 Q. Why not?

9 A. I didn't want my family to see it.

10 Q. Do you have children, Mr. Doe?

11 A. Yes, I do. I have three children.

12 Q. Mr. Doe, who is Josh Bernstein?

13 A. Josh Bernstein was an analyst who worked at Bayrock for  
14 awhile. I don't remember the exact dates of employment.

15 Q. Was he fired?

16 A. Yes, he was.

17 Q. Why?

18 A. He kept taking time off and kept submitting personal  
19 expenses as business related expenses and eventually the  
20 decision was made to terminate him.

21 Q. Did you ever give Mr. Bernstein the file you just  
22 described marked personal and confidential or any of the  
23 documents in it that related to the criminal case

24 98-CR-1101?

25 A. Absolutely not.



Doe-direct/Moore

1 Q. Is there any reason you would have given Mr. Bernstein,  
2 an analyst at Bayrock, those documents?

3 A. Absolutely not.

4 Q. Did you consider those documents to be highly sensitive  
5 and personal?

6 A. Highly sensitive, personal and dangerous to myself and my  
7 family.

8 MS. MOORE: No further questions, your Honor.

9 THE COURT: Mr. Lerner, do you wish to inquire?

10 MR. LERNER: With the Court's permission,  
11 Mr. Stamoulis is going to question the witness.

12 THE COURT: Sure.

13 CROSS-EXAMINATION

14 BY MR. STAMOULIS:

15 Q. Good afternoon, Mr. Doe. My name is Stam Stamoulis.  
16 I'm counsel to Jody Kriss and Michael Ejekam.

17 Do you know who Michael Ejekam is?

18 A. Yes, I do.

19 Q. What do you understand to be his relationship with  
20 Bayrock?

21 A. He's a friend of Jody's from college and he was sourcing  
22 -- looking for deals to introduce to Bayrock.

23 THE COURT: Mr. Stamoulis, just to avoid any  
24 objections which are going to be made, confine yourself to the  
25 direct, okay. The only issue on direct examination is whether

Doe-cross/Stamoulis

1 or not Mr. Doe had given consent to anybody specifically.

2 MR. STAMOULIS: Yes, your Honor. I would like to  
3 inquire of the witness whether my two clients were ever given  
4 the file.

5 THE COURT: Okay. I anticipated, I saw Ms. Moore  
6 about to get up and, so, I was anticipating what might be  
7 unnecessary colloquy.

8 Q. In your involvement with Mr. Ejekam, whatever that may  
9 be, at Bayrock, did you ever have occasion to give him any  
10 aspect of that file that you described as being kept in your  
11 desk draw?

12 A. No.

13 Q. In your involvement with Mr. Kriss while at Bayrock, did  
14 you ever have occasion to give Mr. Kriss any aspect of that  
15 file that was kept in your desk drawer?

16 A. No.

17 Q. Did Mr. Ejekam or Mr. Kriss give you any reason to  
18 believe that they personally acquired the contents of that  
19 file at any time?

20 A. No.

21 Q. Did you ever inquire -- let me take a step back.

22 You said that Mr. Bernstein was an analyst?

23 A. I believe that was his official title.

24 Q. What did his job responsibilities entail?

25 A. Generally, to do the financial modeling when we would

Doe-cross/Stamoulis

1 look for a deal. He would do the financial modeling on  
2 certain things, he would do some follow-up phone calls,  
3 follow-up letters, things of that nature. It was a real  
4 estate development shop and basically assistance to myself  
5 or Jody Kriss or any of the other people employed at Bay  
6 Rock.

7 Q. Did any aspect of his responsibilities ever relate to  
8 maintenance of data of Bayrock files?

9 A. He was probably the most technologically advanced of the  
10 group, so from time to time I'm sure I've asked and I'm sure  
11 members of the firm had asked him to do something to do with  
12 their Blackberries or something to do with emails or  
13 computers, yes.

14 Q. Do you remember the nature of any of those somethings  
15 that you asked Mr. Bernstein to deal with with regard to  
16 data?

17 A. I was deposed in a case where Mr. Bernstein is currently  
18 suing Bayrock in White Plains and that same question was asked  
19 of me and I believe we're speaking of the hard drive. If you  
20 could clarify? I may have asked him other things from time to  
21 time. If you'll refresh as to that?

22 Q. I'm not there yet. But, generally speaking, what was the  
23 nature of the -- the specific nature of the projects that  
24 Mr. Bernstein would be requested to do with regard to data at  
25 Bayrock?

Doe-cross/Stamoulis

1 A. In regard to a specific request I made of him we have a  
2 server where all the emails and everybody's correspondence and  
3 things of that -- files are stored. Files are stored, things  
4 of that nature, and I asked Josh Bernstein to buy a large  
5 backup hard drive to make a backup of our files in case of a  
6 crash, in case of a systems crash, so we could have a copy of  
7 our files.

8 Q. Did you ask Mr. Bernstein to keep that hard drive at his  
9 home?

10 A. Absolutely not. In fact, I -- when Mr. Bernstein was  
11 being asked to leave, I specifically remember myself and  
12 Julius Schwartz asking him to return files and what later  
13 came to be known is that there was a hard drive he never  
14 returned.

15 Q. Do you recall Mr. Bernstein purchasing that hard drive  
16 out of his own personal funds?

17 A. I don't remember the details. I doubt Mr. Bernstein paid  
18 for his own -- with his own funds. He may have paid for it  
19 and got reimbursed. I'm sure he didn't pay for it from his  
20 own funds without reimbursement. Mr. Bernstein would like  
21 reimbursement for everything, including water.

22 Q. Do you know whether indeed he was reimbursed for  
23 purchasing the external hard drive?

24 MS. MOORE: Objection.

25 THE COURT: You can answer.

Doe-cross/Stamoulis

1 A. I'm not sure. I don't remember.

2 Q. These documents you maintained in your desk?

3 A. Yes.

4 Q. Did you ever have an electronic version of those  
5 documents in your possession at any time?

6 A. I may have had an electronic version of those documents.  
7 My previous attorney in my case lived in Florida and it is  
8 possible he emailed me or I emailed him those documents with  
9 the caveat that obviously any communication between me and him  
10 was always marked privileged and confidential. It was between  
11 me and my attorney and had nothing to do with Bayrock or any  
12 type of real estate related deals.

13 Q. Is it possible those electronic versions of the documents  
14 made it onto the email server you asked Mr. Bernstein to copy  
15 though this hard drive?

16 A. Possible.

17 Q. It is your sworn testimony that you did not ask  
18 Mr. Bernstein to keep personal possession of that hard drive  
19 and maintain it at his home for safekeeping?

20 A. I don't believe I ever asked him to keep it at his home  
21 for safekeeping. I remember asking him to make a hard drive  
22 backup and give it to me, if anything, not to keep for  
23 himself.

24 MR. STAMOULIS: I have no further questions, your  
25 Honor.

Doe-cross/Lerner

1 THE COURT: Thank you. Mr. Lerner.

2 CROSS-EXAMINATION

3 BY MR. LERNER:

4 Q. Mr. Doe, you have no reason to believe that Mr. Bernstein  
5 told Mr. Oberlander that he stole documents from you, do you?

6 A. I'm sorry, I don't understand the question.

7 Q. Do you have any reason to believe Mr. Bernstein told  
8 Mr. Oberlander that those documents were stolen?

9 A. I don't know what he said to Mr. Oberlander.

10 Q. Now --

11 A. I'm sorry, no, I actually disagree with that. I was  
12 shown the transcript of -- Mr. Bernstein's transcript from  
13 when he was deposed and he actually stated there, and  
14 Mr. Oberlander was his attorney there or was sitting in on all  
15 of his depositions where Mr. Bernstein said that he took  
16 thousands of documents and brought them home. Documents, not  
17 emails or servers. Physical documents he claimed he took and  
18 brought home with him and kept there.

19 Mr. Oberlander should have easily understood he  
20 wasn't asked to use his apartment as an off-site storage  
21 facility for Bayrock. Yes, he should have understood they  
22 were stolen by Mr. Bernstein.

23 Q. Aren't there emails from you to Mr. Bernstein discussing  
24 him holding onto the documents at your request?

25 A. I don't remember. I don't remember having those emails

Doe-cross/Lerner

1 back and forth with Mr. Bernstein.

2 Q. You would be surprised if there were such emails from  
3 you?

4 A. Depending on what they said. I've asked Josh Bernstein  
5 to make a backup. I've asked Josh Bernstein. There were many  
6 times he held various documents in his possession and his  
7 office. He was an analyst. I have never asked him to hold  
8 personal documents of mine in his possession and I would be  
9 extremely surprised if there was any emails or correspondence  
10 between me and Mr. Bernstein asking him to hold my personal  
11 privileged court documents. Yes, I would be very surprised.

12 Q. You said Mr. Bernstein is an analyst. Wasn't his job  
13 description to be a techie, somebody whose responsibility it  
14 was to maintain backups?

15 A. He did a bunch of tech related stuff around the office  
16 from time to time. He was the most technically capable.

17 Q. At your direction?

18 A. Either mine, his own or somebody else's direction.

19 Q. Among the tasks that you directed him to undertake was  
20 backing up emails and hard drives; isn't that correct?

21 A. I asked him to buy a large hard drive and back up our  
22 server which had a whole bunch of files on them, including  
23 emails, yes.

24 Q. You asked him to keep that backup drive at his home;  
25 isn't that correct?

Doe-cross/Lerner

1 A. I don't remember asking him to keep it at his home.

2 I remember when he was leaving I asked him to return  
3 everything.

4 Q. If you asked him, you understood he didn't have it on the  
5 premises; isn't that correct?

6 A. I didn't know what he has. He had an office. He had  
7 things in his office and I don't know where he kept most of  
8 those things.

9 Q. You don't know if he had a backup hard drive in his  
10 office versus at his home?

11 A. No, I didn't. He may have had it at his home or in the  
12 office. I don't remember which specifically. I remember  
13 Julius Schwartz specifically asking him to return everything  
14 that was work related. That was when he was terminated.

15 Q. Can you describe for us your office? How is it locked?  
16 Is it a corner office? If someone were to go into that office  
17 during the daytime, would that person be seen by others?

18 A. Not necessarily. It was -- if the door was closed you  
19 wouldn't know who was inside.

20 Q. Does it have windows, external windows --

21 A. No.

22 Q. -- so one side could be seen from a secretarial station?

23 A. No. Door and wall.

24 Q. So, you testified that you kept your office locked at  
25 night.



Doe-cross/Lerner

1 A. I kept my desk, not my office, because cleaning staff  
2 would come onto the premises after we were all done.

3 Q. So, if the documents were stolen, they were stolen during  
4 the daytime; is that your testimony?

5 A. I wouldn't know when they were stolen, if they were  
6 stolen. I know I didn't hand it to him in any way, shape or  
7 form.

8 Q. It could have been on an email server; isn't that  
9 correct?

10 A. It is possible, but I'm not 100 percent sure.

11 Q. He was directed by you to keep backups of emails; isn't  
12 that correct?

13 A. He was directed to make a backup for me, not keep them.

14 Q. It was not within his job description for which he was  
15 hired to keep backups; isn't that correct?

16 A. I'm sorry. No, it was actually in his job description to  
17 assist and help the members of Bayrock and the requests they  
18 made of him which may have been whatever request they were  
19 making of him. In fact, many of the things he was creating  
20 were in electronic form, so there may have been a time when he  
21 was asked to do something in a tech capacity, yes.

22 Q. You just referred to yourself as a member of Bayrock?

23 A. I referred to myself -- yes, I was.

24 MS. MOORE: Objection, your Honor.

25 THE COURT: Overruled.

Doe-cross/Lerner

1 Q. Please clarify, were you an owner of Bayrock?

2 A. No.

3 Q. What did you understand yourself to be when you referred  
4 to yourself as a member of Bayrock?

5 A. A member is one of the people who was at the firm.

6 Q. Were you a partner?

7 A. I was a partner in deals, yes.

8 Q. What was the purpose of putting your personal emails on  
9 the email of Bayrock; why did you do that?

10 A. I don't believe I did, but in the course of sending and  
11 receiving hundreds of emails that most people do in a week, is  
12 it possible something may have made it in of a personal  
13 nature? Of course it is possible. Was it my habit to use  
14 Bayrock as my personal email? No, it wasn't, but it is  
15 possible it made it in there.

16 Again, I don't know the specifics. I don't  
17 understand the specifics that you're asking about, but, yes,  
18 it is possible.

19 Q. Do you know how to use a scanner?

20 A. Yes, I do.

21 Q. When you said you had these documents and referring to  
22 the purportedly sealed and confidential documents --

23 A. I didn't say they were sealed and confidential. I said  
24 the folder was marked personal and confidential.

25 Q. Did you scan them in yourself or have someone else scan

Doe-cross/Lerner

1 them in?

2 A. What do you mean?

3 Q. You said you have them in electronic form?

4 A. I didn't say -- I said may. You said did you have them  
5 in electronic form, or Mr. Stamoulis asked. I said they may  
6 have been. My attorney was in Florida at the time and we may  
7 have been communicating electrically. It is possible. I will  
8 tell you I did not scan them in nor did I have anyone scan  
9 them in. If there was an electronic and written form, it  
10 would have been from me printing them from an electronic form  
11 but never scanning them into a scanner.

12 Q. Why didn't you keep them in a locked safe?

13 A. I did not have a safe. I had a desk that was locked and  
14 I believed that my desk was my desk and had personal things in  
15 that desk. I had pictures of my children which I believe  
16 belong to me. I kept my desk locked as often as possible, so  
17 I didn't realize I had the need of a safe, especially in a  
18 small office where pretty much everybody was very friendly.  
19 It wasn't a large corporation with hundreds of people running  
20 around. I didn't think there was a need for a safe.

21 MR. LERNER: Thank you. No further questions.

22 REDIRECT EXAMINATION

23 BY MS. MOORE:

24 Q. Mr. Doe, earlier today during the proceeding Mr. Lerner  
25 represented in court that you had spoken to Mr. Bernstein and

Doe-direct/Moore

1 Mr. Bernstein had told him that these documents were part of  
2 several disks that you had given him.

3 Did you ever give Mr. Josh Bernstein several disks  
4 that contained these documents?

5 A. I have never given Josh Bernstein disks, written  
6 documents, electronic forms of anything to do with my case,  
7 anything to do with the personal nature of my life, especially  
8 things that I was afraid of, especially items and paperwork  
9 which I believed to be very, very dangerous to my life and the  
10 life of my children, my wife and my family.

11 Mr. Bernstein was one of amongst a few people working  
12 at the firm and clearly he would be second-to-last person in  
13 my life who I would give copies of documents like that to.

14 MS. MOORE: No further questions.

15 THE COURT: Anything further?

16 (No response.)

17 THE COURT: Thank you. You're excused.

18 Ms. Moore, do you have anything further?

19 MS. MOORE: Your Honor, I believe respondent Jody  
20 Kriss is here. I would like to inquire of him if he's given  
21 the documents to anyone else or knows anyone else may have  
22 them.

23 MR. STAMOULIS: No objection, your Honor.

24 THE COURT: Ms. Moore, it is your case.

25 J O D Y K R I S S , called as the witness

1 herein, having been first duly sworn/affirmed, testified as  
2 follows:

3 THE CLERK: Would you please state and spell your  
4 name for the record.

5 THE WITNESS: Jody Kriss, K-r-i-s-s.

6 THE COURT: Is that J-o-d-y?

7 THE WITNESS: Yes.

8 DIRECT EXAMINATION

9 BY MS. MOORE:

10 Q. Mr. Kriss, you've heard us referring to a number of  
11 documents, including proffer agreements, a cooperation  
12 agreement and a presentence report that were attached to a  
13 version of a complaint that was emailed to your father on May  
14 12th.

15 Are you familiar with this document?

16 A. Yes.

17 Q. When did you first see those documents?

18 A. In connection with Mr. Oberlander sent them to me prior  
19 to verifying the complaint.

20 Q. Was that roughly early May or --

21 A. Sounds right.

22 Q. Have you provided those documents to anyone else?

23 A. No.

24 Q. Are you aware of anyone else who is in possession of  
25 those documents beyond the individuals that Mr. Oberlander

Kriss-direct/Moore

1 mentioned earlier today?

2 A. I don't think so.

3 Q. Earlier Mr. Oberlander testified that the statement in  
4 the complaint that those documents were sealed was your  
5 statement, not his. You didn't draft that complaint I  
6 realize, but you did verify it.

7 Did you know at the time the complaint was filed that  
8 those documents were sealed?

9 A. No.

10 Q. Why did you verify a complaint that said they were sealed  
11 if you had not in fact known that they were?

12 MR. STAMOULIS: Objection, your Honor.

13 THE COURT: Overruled.

14 A. Same answer Mr. Oberlander gave. I read about it, heard  
15 about it, but didn't -- never saw anything that said that they  
16 were.

17 THE COURT: Speak into the microphone, please.

18 A. Same answer Mr. Oberlander gave that I heard about it,  
19 read about it, but hadn't personally seen anything to say they  
20 were.

21 Q. So, you had no personal knowledge they were sealed, but  
22 you believed they were sealed?

23 A. I think so.

24 MS. MOORE: No further questions, your Honor.

25 MR. STAMOULIS: No follow-up, your Honor.

1 THE COURT: Mr. Lerner?

2 MR. LERNER: No questions, your Honor.

3 THE COURT: You're excused. Thank you.

4 Anything further?

5 MS. MOORE: Your Honor, I have been working with  
6 Mr. Stamoulis on obtaining an affidavit from his client who's  
7 in Africa. I believe once I have the sworn affidavit that  
8 states his other client never saw the version of the  
9 complaint, never saw the attachments and never possessed them  
10 and is not able to disseminate them any further and did not  
11 know they were sealed, I believe there will be no further need  
12 for his client's testimony.

13 His client is in Africa. I'm waiting to get the  
14 affidavit which I believe is on its way from Africa.

15 MR. STAMOULIS: We sent it yesterday. It is the sum  
16 and substance. He will sign it. It is just a matter of  
17 logistically getting it back.

18 MS. MOORE: Your Honor, my only other application is  
19 I would ask the TRO remain in place until we can file some  
20 post-hearing briefs.

21 I would also ask the TRO be extended to two other  
22 documents that are under seal in this District, the criminal  
23 complaint Mr. Oberlander testified he obtained and what I  
24 believe is a draft copy of an information that was also in  
25 Mr. Doe's personal files.

1 I would further ask that my client's name, John Doe,  
2 or any reference to him as John or Doe be replaced with John  
3 Doe in this transcript and we would like an opportunity,  
4 obviously, to brief our further application for an order  
5 directing the return of all the documents that were taken from  
6 Mr. Doe's personal files and an injunction preventing further  
7 use and dissemination of the documents and the information  
8 contained therein.

9 MR. LERNER: We have no objection to continuance of  
10 the TRO. I think the Court already ruled on the PSR, so now  
11 we're just discussing the cooperation agreement and proffer  
12 agreement which are the subject of this order to show cause.  
13 Subject to further briefing we will -- and the other documents  
14 referred to by Ms. Moore, we would address these in further  
15 briefing. Of course, pending on the determination of the  
16 Court, we'll not disseminate these documents in any way.

17 I would also like an opportunity -- your Honor, I  
18 referred to in questioning Mr. Doe, I referred to some  
19 emails. I would like an opportunity to supplement these  
20 briefings with emails that are referred to. I don't have them  
21 on hand, but I would ask for the opportunity to just submit  
22 them to the Court.

23 MS. MOORE: No objection to that, your Honor. And  
24 one other thing, your Honor --

25 THE COURT: Excuse me. These are emails from Mr. Doe



1 to Mr. Bernstein.

2 MS. MOORE: Your Honor, to the extent that we're  
3 asking the TRO be extended to the two other documents in the  
4 complaint and the information, we've had trouble serving  
5 Mr. Josh Bernstein. We would ask to the extent respondents  
6 have access to him, they let him know the order has been  
7 extended to those documents as well.

8 MR. LERNER: I have access to Mr. Arnold Bernstein  
9 via email. I think I also have access -- I think the email  
10 that Mr. Arnold Bernstein sent to me may have John Bernstein  
11 CC'ed. That's how I could contact him.

12 If the Court wishes to enter an order directing he be  
13 served or that I disclose the email address, I'll do that.

14 THE COURT: By all means.

15 Anything further?

16 MS. MOORE: No.

17 THE COURT: Does anybody want to be heard further  
18 with respect to what has transpired here this morning and part  
19 of the afternoon?

20 MS. MOORE: I do have one further inquiry. As the  
21 Court knows, there was a cross motion to be able to obtain the  
22 affidavit of Mr. Bernstein. I'm assuming no such affidavit is  
23 going to be forthcoming and there will be no evidence from  
24 Mr. Bernstein.

25 MR. LERNER: As I indicated, I spoke with

1 Mr. Bernstein on the telephone. I communicated by Arnold  
2 Bernstein and was told by Arnold Bernstein that Joshua  
3 Bernstein isn't going to cooperate and he's represented by  
4 counsel. I assumed that meant he was represented by Arnold  
5 Bernstein. If I was mistaken in that regard, that would just  
6 be cleared up I suppose when I give over Mr. Josh Bernstein's  
7 email address to Ms. Moore.

8 THE COURT: Anything else?

9 MS. MOORE: No, your Honor.

10 THE COURT: Just so we're clear as to what I would  
11 like to have some post-hearing briefs submitted on, I've ruled  
12 with respect to the presentence report. With respect to the  
13 other documents which were part of a file that was marked  
14 sealed that was pursuant to a court order, the first question  
15 is whether that order is on its face clear to the extent that  
16 it says -- I'm sorry, I don't have the sealing envelope in  
17 front of me -- maybe I do. Document placed in a sealed  
18 envelope which provides it is ordered sealed and placed in the  
19 Clerk's office may not be unsealed unless ordered by the  
20 Court. Whether that order is an order which is clear enough  
21 on its face with respect to documents which are sealed would  
22 be enough to inform anybody coming into possession of such a  
23 document that it is what it purports to be, namely, a sealed  
24 document conveying with a very clear message that it is not to  
25 be for public or general disclosure.

1           To the extent there's some question as to whether it  
2 is an in rem or in personam order, I think the law is pretty  
3 clear that an order of the Court, assuming one is aware of the  
4 fact or should be aware of the fact that an order of the Court  
5 has been issued, I believe there's authority for the  
6 proposition that orders of the Court are to be obeyed and are  
7 disobeyed at one's risk. I think that is the essence of civil  
8 disobedience which needs no further elaboration. That's a  
9 matter for post-hearing briefing.

10           Also, the extent to which the Court does have some  
11 authority to enjoin the dissemination of documents such as  
12 cooperation agreements, proffer agreements is the language of  
13 that Southern District informational cite that says caution  
14 should be exercised, not a sufficient basis upon which one may  
15 enjoin for information regarding a person's cooperation with  
16 the government, and the purpose of not disseminating or  
17 exercising caution need not be elaborated on.

18           If you want a briefing schedule, I will be happy to  
19 provide one. Give me an indication as to how much time you  
20 think you need.

21           MS. MOORE: One week, your Honor.

22           THE COURT: Mr. Lerner.

23           MR. LERNER: We'll need additional time. Can we  
24 have two weeks to respond?

25           MS. MOORE: Will there be simultaneous briefs, your

1 Honor?

2 THE COURT: No. I prefer you can submit your brief,  
3 Mr. Lerner will be given an opportunity to reply. I will give  
4 him one week to respond. I don't think there will be anything  
5 to reply to.

6 Mr. Stamoulis, I don't think that you have a dog in  
7 this fight.

8 MR. STAMOULIS: Happily not, your Honor.

9 THE COURT: All right.

10 MS. MOORE: Your Honor, if we could just receive the  
11 additional email you intended to submit to the Court so we  
12 have it.

13 MR. LERNER: Sure.

14 THE COURT: All right. I suppose a collateral  
15 question --

16 MR. LERNER: My client wishes to know whether these  
17 proceedings today are sealed?

18 MS. MOORE: Your Honor, all I ask is the name be  
19 redacted to change to John Doe.

20 THE COURT: Ms. Brymer, wherever the name of John or  
21 Doe appears substitute John Doe for John Doe.

22 MS. MOORE: Your Honor, given the history, I would  
23 also ask everyone present in the courtroom be directed that  
24 they not advise anyone the John Doe referenced in the document  
25 is my client.

1 MR. LERNER: That's fine.

2 THE COURT: Ms. Moore, there is I think an extent  
3 even to which the broad enormous powers of Federal Courts do  
4 not extend and I think the limit to which you're requesting  
5 that power be extended is beyond the borders of Federal Court  
6 power, which is quite enormous, but if exercised carelessly  
7 can be quite inappropriate. I'm not directing the court or  
8 the world at large with respect to this proceeding, John Doe  
9 or everybody here.

10 It seems to me that in addition to purely legal  
11 issues there are issues of professional responsibility which  
12 are quite significant. There may be some DR, disciplinary  
13 rule, with respect to the obligation of attorneys regarding  
14 the use of documents which are marked sealed, whatever they  
15 may be. Whether that would provide a basis for injunctive  
16 relief or not I don't know. It is a matter which may be  
17 explored. I suppose if one thinks imaginably one may think of  
18 a lot of reasons why an order may or may not be issued  
19 providing for injunctive or other relief. With respect to the  
20 last request you made it is denied.

21 Anything further?

22 (No response.)

23 THE COURT: I'll see you -- or if you want oral  
24 argument -- I guess you do. So, one week for a briefing from  
25 you, Ms. Moore, one week thereafter from you, and why don't we

1 set it down for further oral argument a week thereafter.

2 Whatever those dates are.

3 Can you give me some dates? Today is the 21st. So,  
4 the 28th from you. Seven days thereafter, what day is that?

5 THE CLERK: The 5th, which is a holiday.

6 THE COURT: 6th of July, that's going to spoil  
7 somebody's Fourth of July weekend. We can extend it another  
8 day or two. Give me a number.

9 MR. LERNER: July 9th, Friday.

10 THE COURT: You've gotten the two weeks you asked me  
11 for.

12 Do you want another week, Ms. Moore?

13 MS. MOORE: No.

14 THE COURT: Give me a date for oral argument. 28th  
15 of June for Ms. Moore, July 9th for Mr. Lerner and give me an  
16 oral argument date. What day of the week is July 9th?

17 THE CLERK: Friday.

18 THE COURT: Why don't we put it down for oral  
19 argument the following Friday, which would be the 16th of  
20 July. Okay.

21 Am I interfering with somebody's vacation? July  
22 16th. Okay. We're finished today. Thank you very much.

23 MR. LERNER: Your Honor, would it be possible to  
24 make the oral argument on the Tuesday of the following week,  
25 which would be the 20th?

1 THE COURT: Is that date all right?

2 MS. MOORE: Fine, your Honor.

3 THE CLERK: 10:30.

4 MR. LERNER: 10:30, your Honor. Thank you.

5 (Proceedings concluded.)

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